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LAW REPORTS.

Equity Cases

BEFORE

THE MASTER OF THE ROLLS

AND THE

VICE-CHANCELLORS.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

VOL. VII.

1868-9.—XXXII VICTORIÆ.

LONDON:
PRINTED FOR THE COUNCIL OF LAW REPORTING
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14 CHARING CROSS.
PUBLISHING OFFICE, 51 CAREY STREET, LINCOLN'S INN, W.C.

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Equity Cases

BEFORE

THE MASTER OF THE ROLLS,

AND THE

VICE-CHANCELLORS.

MILLER *v.* MARRIOTT.

M. R.
1868
Nov. 9.

Partition Suit—Sale—Costs—31 & 32 *Vict. c.* 40.

In a partition suit, where the property was held in equal shares, the costs of all parties, on a decree for sale under 31 & 32 Vict. c. 40, were ordered to be paid out of the estate.

[illegible]
16 Eq. 183.

BY the will of *James Parke* certain real estates were devised (subject to a charge) in equal fourth parts. The bill in this suit was filed by the owners of one of the fourths, praying for a sale with the consent of the Defendants, or, in the alternative, for a partition.

It was stated at the Bar that three of the fourths were vested in owners who were *sui juris:* and the remaining fourth in trustees who had a power of sale.

A decree was now made for a sale under 31 & 32 Vict. c. 40.

The *Solicitor-General* (Mr. *Baggallay*), and Mr. *Everitt*, for the Plaintiffs, asked that the costs of all parties might be paid out of the proceeds of sale. The Court was enabled to make such an order by the 10th section of the Act; and had acted on the power under similar circumstances in *Osborn* v. *Osborn* (1). Further, it

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(1) Law Rep. 6 Eq. 338.

M. R. 1868 MILLER v. MARRIOTT.

would have been necessary to come to the Court in order to satisfy the charge; and then the costs would clearly have been payable out of the estate.

Mr. *Nalder* for the parties interested in another fourth, and Mr. *Spencer Percival* for the owner of another fourth, who was also trustee of the charge, supported the application.

Mr. *Upton*, for the owner of the remaining fourth, opposed the application, citing *Landell* v. *Baker* (1).

LORD ROMILLY, M.R.:—Where the rights are exactly equal, and a sale is equally for the advantage of every one, ought not the costs to be paid out of the estate? If the shares were unequal, different considerations might apply.

Mr. *Upton*:—If the sale is made under the Act, *Landell* v. *Baker* governs the case. But, in truth, it was not necessary to take a decree under the Act, as the parties were competent to make a title without having recourse to it, and therefore the old rule as to the costs in partition suits will apply. The charge cannot affect the case, as the suit was not instituted for the purpose of paying it off.

LORD ROMILLY, M.R.:—

The Plaintiff has only one-fourth of the property; the Defendants have the other three-fourths, and they all get the advantage of the Plaintiff's bill, and of the costs he has incurred, which are usually the greatest. The Vice-Chancellor *Malins* thought that under these circumstances the costs of all parties ought to come out of the estate, and I am disposed to follow him.

Solicitors: Messrs. *S. F. Miller & Son*; Messrs. *Scott & Co.*; Messrs. *Baxter, Rose, Norton, & Co.*; Messrs. *Young, Maples, & Co.*

(1) Law Rep. 6 Eq. 268.

In re GENERAL ESTATES COMPANY.

M. R.
1868
June 12;
Nov. 24.

HASTIE'S CASE.

Winding-up—Bankruptcy—Liability of Bankrupt Shareholder to pay subsequent Calls—Bankruptcy Act, 1861, *s.* 154—*Companies Act*, 1862, *ss.* 75, 77.

10 Eq 446

A member of a limited company who has become bankrupt and obtained his discharge, and whose estate has been fully administered by the assignee, remains liable, in the event of the company being subsequently wound up, to be made a contributory in respect of his shares not fully paid up, and is not exonerated under sect. 154 of the *Bankruptcy Act*, 1861, or sect. 75 of the *Companies Act*, 1862, unless the assignee has been substituted for him under sect. 77 of the *Companies Act*, and the assignee, if he does not elect to take the shares cannot be compelled to do so, or be made liable as a contributory.

The case of *Martin's Patent Anchor Company* v. *Morton* (1), commented on.

Affd by LJJ 4 Ch 274

THIS was an application to remove the name of Mr. *Hastie* from the list of contributories of the *General Estates Company, Limited.*

The company was formed in 1865, and duly registered under the *Companies Act*, 1862, in July, 1865. *Hastie* was one of the original shareholders, holding 125 shares of £20, on each of which £2 had been paid.

In April, 1866, he became bankrupt. Shortly afterwards the creditors' assignee was appointed, who refused to take the shares.

On the 5th of July, 1866, *Hastie* obtained his discharge under the bankruptcy, his estate having been duly administered and wound up.

The company being in course of voluntary winding up an order was made on the 27th of November, 1866, for the continuance of the winding up under the supervision of the Court, and the sum of £18 remained due on each of the 125 shares which *Hastie* took.

The liquidator, in settling the list of contributories, put on *Hastie's* name for 125 shares, and the object of the present application was that the name of the assignee might be substituted, or that *Hastie's* name might be removed from the list of contributories, on the ground that all his liabilities to future calls had been

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(1) Law Rep. 3 Q. B. 306.

M. R.
1868
Hastie's Case.

discharged under the *Bankruptcy Act*, 1861, and the *Companies Act*, 1862.

The question in the case mainly depended on the construction of sect. 154 of the *Bankruptcy Act*, 1861, and sects. 75 and 77 of the *Companies Act*, 1862 (1).

Mr. *Jessel*, Q.C., and Mr. *Fischer*, in support of the application:—

We submit that the name of the applicant should be removed from the list of contributories, on the ground that he is discharged from all liability. This case is not to be governed by that of *Martin's Patent Anchor Company* v. *Morton* (2), where it was held that a shareholder who had become bankrupt and received his discharge but retained his shares was liable for future calls. There is no ground for saying that sect. 75 of the *Companies Act*, which makes it lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls, only applies where the bankruptcy of the contributory is contemporaneous with or subsequent to the winding-up of the

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(1) Sect. 154 of the *Bankruptcy Act*, 1861, is as follows:—

"If any bankrupt shall at the time of adjudication be liable, by reason of any contract or promise, to pay premiums upon any policy of insurance, or any other sums of money, whether yearly or otherwise, or to repay to or indemnify any person against any such payments, the person entitled to the benefit of such contract or promise may, if he think fit, apply to the Court to set a value upon his interest under such contract or promise, and the Court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained."

The sections of the *Companies Act* referred to are as follows:—

Sect. 75. "The liability of any person to contribute to the assets of a company under this Act in the event of the same being wound up, shall be deemed to create a debt (in *England* and *Ireland* of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability; and it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls, as well as calls already made."

Sect. 77. "If any contributory becomes bankrupt either before or after he has been placed on the list of contributories, his assignees shall be deemed to represent such bankrupt for all the purposes of the winding-up, and shall be deemed to be contributories accordingly, and may be called upon to admit to proof against the estate of such bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any moneys due from such bankrupt in respect of his liability to contribute to the assets of the company being wound up."

(2) Law Rep. 3 Q. B. 306.

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company, for there is nothing in the section to restrict the meaning of the word "contributory," which includes every person liable to contribute, and it would be inconsistent with the other sections. That section enables the liquidator to prove against the bankrupt's estate for future calls, though the winding-up is subsequent to his discharge. It is impossible that the bankrupt can remain liable for calls to be made on his shares after they have passed into the hands of the assignee. He is fully discharged under the statute, whatever may be the effect of the decision of the Court of Queen's Bench, which is not a binding authority on this Court.

Mr. *Roxburgh*, Q.C., and Mr. *Edmund James*, for the liquidator:—

The judgment of the Court of Queen's Bench is consistent with the true construction of the statute. There is a distinction in the Act between a "shareholder" and a "contributory." Before the commencement of the winding-up a man is a "shareholder;" afterwards he is a "contributory," and sects. 74—78, apply to persons who are members of the company and liable to contribute at the time when the winding-up commences. When the bankruptcy of *Hastie* occurred, no calls had been made, and it would then have been impossible for the company to have proved against his estate in respect of possible future calls, but there was at that time no debt, and the bankrupt's discharge did not affect his liability in respect of subsequent calls. When the winding-up commenced, and the liabilities were ascertained, then sect. 75 of the *Companies Act* came into operation. There is nothing in this section to discharge the applicant from his liability in respect of calls made subsequently to his discharge, for the discharge only applies to debts proveable under the bankruptcy.

The liability to pay future calls was not a contract within the meaning of sect. 154 of the *Bankruptcy Act*, 1861, for there can be no breach of contract till there has been non-payment of a call when actually made.

[They referred to *South Staffordshire Railway Company* v. *Burnside* (1); *General Discount Company* v. *Stokes* (2).]

Mr. *Jessel*, in reply.

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(1) 5 Ex. 129.

(2) 17 C.B. (N.S.) 765.

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Nov. 24. LORD ROMILLY, M.R.:—

The facts of this case raise a question of considerable importance, which I have felt much doubt about, and have taken a long time to consider.

The facts are these:—[His Lordship then stated the facts of the case.]

It is obviously impossible to put the assignee on the list of contributories. He cannot be compelled to take the shares. He has repudiated them, and cannot be made liable for anything in respect of them. Whether the bankrupt, Mr. *Hastie*, should be put on the list of contributories depends on the question whether he is liable, notwithstanding his bankruptcy and discharge, to pay the calls to be made on these shares. If he is not so liable, then, on the principle which prevents a holder of paid-up shares from being placed on the list of contributories unless by his own desire, I think that he ought not to be placed on the list.

That this liability to pay the calls is originally a debt due from him cannot be doubted, for the 16th section of the *Companies Act*, 1862, makes it a debt, exactly as if he had contracted to pay it; but then arises the question whether, under sect. 154 of the *Bankruptcy Act*, 1861, he is not discharged, or, if he be not discharged from such liability under the Act of 1861, whether sects. 75 and 77 of the *Companies Act*, 1862, do not make it imperative for the company to prove against the estate of the bankrupt for future calls as well as for calls existing at the date of the bankruptcy. The question seems to be in a great measure governed by the case of *Martin's Patent Anchor Company* v. *Morton* (1), the head-note of that case is as follows:—"A shareholder in a company under the *Companies Act*, 1862, who has become bankrupt and received his discharge, but retains his shares, is not discharged from liability to pay subsequent calls, whether made while the company is in operation, or when it is being wound up: for the covenant of the shareholder on becoming a member under sect. 16 to pay the calls on his shares is not 'a contract to pay sums of money yearly, or otherwise,' within sect. 154 of the *Bankruptcy Act*, 1861, so as to make the present value of their liability proveable under that section; and sect. 75 of the *Companies Act*, 1862, which makes it 'lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls,' only applies where the bankruptcy of the contributory is contemporaneous with the winding up of the company."

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(1) Law Rep. 3 Q. B. 306.

I have carefully considered that case as bearing upon the present, to which it seems expressly to apply. In deciding that case, Mr. Justice *Blackburn* says (1): "It would be a monstrous injustice that, when a man remains a shareholder, the assignees not taking his shares, he should yet be allowed to get rid of his liability to pay calls on the ground that he has been a bankrupt several years before."

But this observation does not seem to take into account, that if the shares are worth anything the assignee will take them and sell them, and that the bankrupt has no possible means of getting rid of them if they are utterly worthless, but will still remain liable for the future calls which may be made, though the policy of the *Bankruptcy Act*, 1861, is to release him from all liabilities.

However, this is certain, that inasmuch as his liability to pay these calls is a legal liability imposed by the 16th section of the *Companies Act*, 1862, it follows necessarily that he must pay them unless he is relieved by the effect of some Act of Parliament. The only Acts which relate to this subject are the *Bankruptcy Act*, 1861, and the *Companies Act*, 1862. In the first of these statutes the section especially relied upon is sect. 154, which is as follows:—[His Lordship then read the section.]

It is quite settled by *South Staffordshire Railway Company* v. *Burnside* (2), and *General Discount Company* v. *Stokes* (3), that under the prior Bankruptcy Acts, future calls were not proveable either as a debt payable *in futuro*, or as a debt due on a contingency. The question on this Act is, does this section carry the matter further? and I think it must be answered that it does not carry the matter further than the previous Bankruptcy Acts in respect of making the future calls proveable as debts. It is plainly impossible, for the proof must be for the value of the liability, and

(1) Law Rep. 3 Q. B. 311.

(2) 5 Ex. 129.

(3) 17 C. B. (N.S.) 765.

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this cannot possibly be ascertained, inasmuch as it is obviously impossible to know whether or not any call will ever be made in the case of a company that is still a working company. The section was obviously meant for fixed payments *in futuro*, at any interval of time. It resembles a case where a man having entered into a covenant with a lessor that the lessee should leave the property leased at the end of the term in a proper state of repair becomes bankrupt and obtains his discharge before the termination of the lease, in which case he still remains liable on his covenant to the lessor, who could not by any possibility have proved for anything under the bankruptcy.

The other statute relied on is the *Companies Act*, 1862. When we come to look at this Act, we find sects. 75 and 77 which apply to this subject, and of these, sect. 75 provides for proof and payment on valuation where the company is in course of liquidation:—[His Lordship then read sect. 75.]

The question is, whether this section extends to a case where the bankruptcy has been wound up, the bankrupt discharged, and the assets administered, before the winding up of the company.

The Judges in *Martin's Patent Anchor Company* v. *Morton* (1) thought that this could not be the construction of the section, for that an order to prove a debt against the estate of a bankrupt where the bankruptcy had been completely and finally wound up was on the face of it a mere mockery. And Mr. Justice *Blackburn* observed that the following sections, 76 and 77, shew that sect. 75 refers to a bankruptcy still pending when the winding-up takes place, while the assignees have still assets, and that in such a case the company may prove for the estimated amount of the liability to future calls. Mr. Justice *Lush* does not seem entirely to adopt this view, and makes this observation (2): "The construction sought to be put by the Defendants' Counsel on sections 75 and 77 of the *Companies Act*, 1862, cannot be maintained. On the other hand, it might be said that the sections refer only to the case of a bankruptcy taking place after the winding-up has commenced; but that would be too narrow a construction. The sections seem to me to refer to the concurrency of the two proceedings, the bankruptcy of the shareholder and the winding up of the company.

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(1) Law Rep. 3 Q. B. 306.

(2) Law Rep. 3 Q. B. 312.

The first part of sect. 75 applies to all shareholders, and says that the liability as a contributory shall be deemed a debt accruing due when he first becomes a contributory, but not payable till the calls are made. The section then goes on to say what is to be done in the case of the bankruptcy of a contributory. The argument of the Defendants requires the language of the section to be altered, or, at any rate, to be read as if it said: It shall be lawful in the case of any contributory, 'who has at any time been bankrupt and obtained his discharge,' to prove against his estate the estimated value of his liability to future calls. But such a provision would be perfectly absurd; how could there be any proof against an estate already administered, and against a man who has become *sui juris?*"

But I am inclined to think that this does not apply to every case, and that cases will arise in which it is difficult to say how the section can be so restricted. As where an estate comes in unexpectedly to the assignee under an old bankruptcy after the bankrupt's discharge, and after the former assets have been administered, and against such property so coming to the assignee, I presume the call made on the bankrupt after his discharge could be proved. If this be so, the difficulty might be avoided by holding that the true construction of the 75th section is, that the bankrupt is not to be discharged from the call unless it can be shewn that there is something in the shape of property not distributed under the bankruptcy, against which the proof might be made, in this way obviating the objection suggested by Mr. Justice *Blackburn;* but certainly the words of the section do not convey this meaning with any distinctness, and the construction of the section is equally difficult, and indeed arbitrary, if it be held that it applies where there are assets remaining unadministered, in which case it absolves the bankrupt, and does not apply where all the assets are administered and the bankrupt discharged. At the same time it is to be observed, that the unanimous decision of the Court of Queen's Bench is that in the latter case the section has no operation.

In support of the view of this section adopted by the Court of Queen's Bench, it may be said that it is the duty of the bankrupt, if he wishes to free himself from the shares, to sell them; or, if he

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cannot do this, to get some person to accept them as transferee; but even then the difficulty is not wholly removed, because as such transferee must be supposed to be a pauper, the directors may refuse to accept the transfer, and consider the prospects of the bankrupt, though he be at that time devoid of all property, better than those of a mere pauper transferee.

On the whole, the case seems to me to be one of difficulty not foreseen and not provided for by the Legislature; and I think that the true construction of the sections referred to does not meet the exact point which has occurred. It might be desirable if the Legislature, following out the principle already adopted, would declare that in all cases where the assignees of the bankrupt refuse to adopt the shares, the company should be at liberty to sell them; and that if the company decline or are unable to do so, the bankrupt should be at liberty to surrender them to the company, and have them cancelled; and that in default of his taking that course he should remain liable. But the Act does not say so, and it is impossible, as it stands, so to construe it.

Of course, if the bankrupt chooses to go on with the speculation and keep the shares, he is at liberty to do so; and in the case in the Queen's Bench the bankrupt appears to have kept them for two years and a half after his bankruptcy and before the company was wound up: accordingly the expressions I have read of Mr. Justice *Blackburn* point to this fact, as if the bankrupt had desired to adopt the shares for his own benefit. In that case, unquestionably, he must be liable for the call if he has since his bankruptcy been speculating on the receipt of a dividend, or on the shares acquiring a value in the market.

In the present case no attempt seems to have been made by Mr. *Hastie* to get rid of the shares he had taken.

The case seems to me to resolve itself into this:—the applicant, who was lately bankrupt, owes a debt to the company, made so by the Act of 1862, sections 16 and 75. He must, therefore, remain liable for this debt, unless he is released by statute. Section 154 of the *Bankruptcy Act*, 1861, does not release him, and sect. 75 of the *Companies Act*, 1862, is too obscurely worded as to this point for me to come to the conclusion that it does release him in the events which have occurred. If this does not, no other

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section does apply, and he must therefore remain liable, unless the assignees are substituted in his place under the 77th section of the *Companies Act,* 1862. That section is to this effect:—[His Lordship then read the section.]

I think that this does not deprive the assignees of their inherent power of electing whether to take the shares or not; and that if they decline to take them, they cannot be compelled to do so. And after their refusal to take the shares, and after they have fully administered the estate of the bankrupt, and distributed it amongst the creditors, it would be monstrous that a subsequent failure should make the assignees contributories, and thereby liable personally to pay these calls—assignees who have no property of the bankrupt remaining, and who have always refused to be mixed up with the affairs of the company. In addition to this, the section says the calls are to be paid out of assets, and in the case I am now considering all the assets are gone.

In this state of circumstances, and for the reasons I have stated, I am of opinion that the Chief Clerk has come to a right conclusion in fixing Mr. *Hastie* on the list of contributories, and that his summons must be dismissed, but without costs.

Solicitors for the Applicant: Messrs. *Tatham & Sons.*
Solicitors for the Liquidator: Messrs. *Treherne & Wolferstan.*

In re SOUTH OF FRANCE COMPANY.

BARON DE BEVILLE'S CASE.

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Nov. 9, 19.

Contributory—Signing Memorandum for Paid-up Shares—Companies Act 1862, *s.* 14.

B. subscribed the memorandum of association of a company for 450 ordinary shares and 138 paid-up shares:—

Held, that he was a contributory in respect of the 450 shares, but not of the 138 paid-up shares.

Semble, the decision would have been otherwise if he had subscribed for 138 paid-up shares only.

4 Ch 826
— 777, 780
8 Eq 328
5 Ch 12
— 274
— 351-5
8 Ch 273.

THE *South of France Wine-growing Districts Company, Limited,* was incorporated under a memorandum of association, which pro-

6 Ch D. 683-5

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vided that the nominal capital of the company should be 60,000 shares, divided into 2000 preferential shares and 1000 paid-up shares of £20 each.

The articles of association provided (clause 6) as follows:—

"It shall be lawful for the company to issue to any person or persons in satisfaction of any services rendered by him or them to the company, or to issue to any corporation, or company, or person, as the consideration for the purchase of the rights of any patented or other invention, or of any concession, grant, or license, or other property, or in respect of any debt due by the company, shares in the company on which the full sum of £20 per share, or so much thereof as shall be agreed upon between the directors and the parties accepting such shares, shall be credited as paid-up; such last-mentioned shares shall be called "paid-up." The holder of any paid-up share shall not be liable to any call in respect of any moneys credited on such shares."

The articles of association contained no explanation of the term "preferential shares:" and it was assumed that "preferential" meant nothing more than "ordinary" shares.

Baron *de Beville* signed the memorandum of association for 450 preference shares and 138 paid-up shares. Upon the company being wound up by the Court, he was placed on the list of contributories in respect of 588 shares; and he now applied that he might be placed thereon as a contributory in respect of 450 shares only.

It was admitted that no paid-up shares were or could have been allotted to Baron *de Beville* under the 6th clause of the articles of association.

Mr. *Southgate*, Q.C., and Mr. *G. N. Colt*, for Baron *de Beville*:—

We admit on the authority of *Evans' Case* (1) and *Migotti's Case* (2), that Baron *de Beville* is liable to be placed on the list of contributories for 450 shares not specified in the memorandum of association to be paid up; but when that is done the provisions of the statute will be satisfied, and he ought not to be placed on the list in respect of the 138 shares stated to be paid up. Both creditors and shareholders must be taken to have been acquainted

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(1) Law Rep. 2 Ch. 427.

(2) Law Rep. 4 Eq. 238.

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with the memorandum of association; and they cannot say that they dealt with the company on the faith that Baron *de Beville* would be under any liability in respect of these shares.

Mr. *Jessel,* Q.C., and Mr. *Fischer,* for the official liquidator:—

The company had no power to issue fully paid-up shares; therefore Baron *de Beville* must take ordinary shares. It may be said that if a person contracts to take paid-up shares he will not be compelled to take ordinary shares instead; but the contrary has been decided in *Daniell's Case* (1); *Nickoll's Case* (2).

Mr. *Southgate,* in reply:—

The cases cited do not apply. They were cases in which the directors having no power to issue paid-up shares, did so fraudulently and behind the backs of the shareholders. Here everything is open and on the face of the memorandum of association. It is quite clear that when a person enters into a conditional contract to take shares he cannot be compelled to take them unless the condition is satisfied: *Pellatt's Case* (3). On this principle Baron *de Beville* ought to be relieved from all liability in respect of the 138 paid-up shares.

Nov. 19. LORD ROMILLY, M.R.:—

This is an application by the Baron *de Beville,* a French nobleman, to have his name removed from the list of contributories so far as regards 138 shares. He is put on the list for 588 shares. He signed the memorandum as the holder of 588 shares, of which 138 were there stated to be paid-up shares: as to the rest, which were not specified to be paid up, there is no question but that he is a contributory. I have come to the conclusion that he is not a contributory as to the 138 shares I have mentioned.

The case, in my opinion, turns on the 14th section of the Act of 1862, which is this:—" The memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantee, or unlimited, be accompanied,

(1) 23 Beav. 568; 1 De G. & J. 372. 3 Jur N.S. 803.

(2) 24 Beav. 639.

(3) Law Rep. 2 Ch. 527.

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when registered, by articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient: the articles shall be expressed in separate paragraphs, numbered arithmetically: they may adopt all or any of the provisions contained in the table marked A in the first schedule hereto; they shall, in the case of a company, whether limited by guarantee, or unlimited, that has a capital divided into shares, state the amount of capital with which the company proposes to be registered; and in the case of a company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the company proposes to be registered, for the purpose of enabling the Registrar to determine the fees payable on registration: in a company limited by guarantee, or unlimited, and having a capital divided into shares, each subscriber shall take one share at the least, and shall write opposite to his name in the memorandum of association the number of shares he takes." This clause, as construed by the decisions upon it, appears to me to amount to this:—A person cannot sign the memorandum of association for shares generally, and afterwards say that some or all of them are paid-up shares, unless money or money's worth was actually paid by him or on his behalf for those particular shares: and also, if he sign the memorandum of association in respect of shares there stated to be paid-up shares, while they are not really paid up, he will, in my opinion, be liable to pay the amount due on the shares. The Court cannot make the distinction between one set of shares and another which does not appear on the memorandum of association; and he is therefore liable for all. But if the distinction is already made on the memorandum of association, and the shareholder signs (for example) in respect of 100 shares generally and in respect of 100 paid-up shares, then, though he is a contributory in respect of the first 100 shares, he is not, in my opinion, a contributory in respect of the 100 paid-up shares. Either the directors of the company had power to enter into a contract to give him paid-up shares or they had not; in neither case does it appear to me that he can be made liable in respect of the paid-up shares. If they had the power, and he had the paid-up shares in

4 Ch 779
5 Ch 355

respect of which the contract was made, he could not, being a holder of paid-up shares, be put on the list of contributories except by his own consent. If they had not the power, the shares are nothing, and no shareholder is deceived, because he had notice of the transaction. The 100 shares for which he has subscribed without qualification are sufficient to satisfy the statute.

But when he subscribes for paid-up shares alone and they are not paid-up, then the subscriber is liable to calls on all the shares, and will be made a contributory accordingly, because, as I have remarked, no distinction can be made between shares which appear on the memorandum of association to be all in the same category; of course he will be allowed on account all moneys paid by him in respect of such shares or money's worth given for them. Such a case is quite distinct from one where the contributory subscribes for a number of shares generally, and for another number of shares as paid up; for the latter set the contributory cannot be made liable.

Solicitors for *Baron de Beville*: Messrs. *Bannister & Robinson.*

Solicitors for the Official Liquidator: Messrs. *Ewbank & Partington.*

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Nov. 4.

14 Ch.D. 838.
843

BUTLER *v.* CUMPSTON.

Liability of Married Woman—Savings from Separate Estate—Calls on Shares.

One of two trustees of a marriage settlement, under which the wife took a separate estate for life without power of anticipation, having shares in a bank vested in him upon the trusts of the settlement, obtained an allotment of new shares at the request of the wife, and upon the faith of her representation that the purchase-money should be paid out of certain savings of her separate estate. The bank failed, and calls were made upon the trustee, who filed a bill to enforce repayment out of the wife's savings:—

Held, that the savings of the wife's separate estate were liable to indemnify the trustee against all calls and liabilities incurred on her behalf in respect of the shares:

Held, also, that money arising from savings of separate estate which had been invested by the wife in the names of the trustees of the settlement without any intimation that it was to be held on the trusts of the settlement, was liable to indemnify the trustee of the shares.

BY a settlement made in the year 1858, upon the marriage of *Thomas Cumpston* and *Jane* his wife, certain property, comprising a considerable number of shares in different companies, belonging to *Jane Cumpston* was assigned to *Alexander Sheriff* and *Ambrose Butler* upon trust to continue the several sums of stock and shares, or any part of them, in their then state of investment, or vary such securities as they should in their discretion think fit, and the trustees were to stand possessed of all the property comprised in the settlement upon trust during the life of *Jane Cumpston* to pay the interest, dividends, and annual produce into her hands for her separate use, with a restraint on anticipation, and after her decease for such persons as she should by will appoint, with limitations over in default of appointment, under which the husband took an annuity of £500 determinable on bankruptcy.

All the trust property comprised in the settlement was transferred into the names of the two trustees, with the exception of fifty-five shares in the *Leeds Banking Company*, which were transferred into the name of the Plaintiff, *Ambrose Butler*, alone, and the dividends upon all the property were received by *Jane Cumpston* in accordance with the trusts of the settlement. In the month of June, 1864, the Plaintiff received a circular from the *Leeds*

Banking Company offering new shares in the bank in respect of the fifty-five shares belonging to *Jane Cumpston*, and then standing in the Plaintiff's name. At the urgent request of *Jane Cumpston* the Plaintiff signed the circular applying for eleven shares, the number having been filled up by Mrs. *Cumpston* herself, or by her husband by her direction, and in pursuance of this application eleven new shares were allotted to the Plaintiff. The *Leeds Banking Company* was ordered to be wound up on the 13th of October, 1864, and the name of the Plaintiff was put upon the list of contributories in respect of the fifty-five old shares and the eleven new shares. On the 29th of January, 1865, a bill was filed by *Alexander Sheriff* against the present Plaintiff and Defendants, praying that the trusts of the marriage settlement might be administered under the direction of the Court, and by a decree made on the 4th of March, 1865, it was declared that the capital of the trust funds, and property subject to the trusts, was liable to pay any calls made, or to be made, in respect of the fifty-five old shares; and by an order of the Court made on further consideration, dated the 18th of April, 1866, it was declared that the present Plaintiff, *Ambrose Butler*, was not entitled to be indemnified out of the *corpus* of the trust funds for any calls made or to be made upon him in respect of the eleven new shares in the *Leeds Banking Company*, and that the interest of *Jane Cumpston* under the settlement was not liable during her coverture to indemnify the Plaintiff for any calls made upon such new shares.

The Plaintiff had been required to pay, and had paid, out of his own moneys, the first payment, by way of purchase-money, of £30 per share, and a call of £110 per share upon the eleven new shares, making together the sum of £1540.

At the time when the application for the new shares was made the Plaintiff, *Jane Cumpston*, had on deposit with the *Leeds Banking Company* in her own name certain savings out of the income of the trust property comprised in the settlement amounting to £350, and she told the Plaintiff that the purchase-money of £30 per share for the eleven new shares was intended to be, and should be, paid by her out of that sum.

The bill alleged that the said eleven shares were applied for by the Plaintiff upon the faith that the purchase-money for, and all

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liability in respect of the same shares would be paid by and out of the separate estate and savings of *Jane Cumpston*, and the application was made by the Plaintiff with reference to, and upon the faith and credit of, such separate estate.

It appeared from the answer of *Jane Cumpston* that she had saved out of the income of the trust funds various sums amounting to £2676, and that £1352, part of that sum, had been invested by her in the names of the Plaintiff and *A. Sheriff*, and it was in evidence that nothing further had been done to intimate that these investments were to be held on the trusts of the settlement.

The bill prayed that all the savings of *Jane Cumpston* which she was not restrained from anticipating might be declared liable to indemnify and make good to the Plaintiff the purchase-money of £30 per share for the eleven new shares in the *Leeds Banking Company*, and the call of £110 per share on the same shares, and all other calls to be hereafter made in respect of such shares, and that the said £1540 might be ordered to be paid to the Plaintiff out of such separate estate.

Mr. *Glasse*, Q.C., and Mr. *Dunning*, for the Plaintiff:—

It has been decided by Vice-Chancellor *Kindersley* that the trust property comprised in this settlement is not liable to make good to the Plaintiff the sums expended by him in payment of the purchase-money and subsequent calls in respect of the eleven new shares. But it has since been discovered that Mrs. *Cumpston* has large sums of money which she has saved out of her separate estate, and the Plaintiff now seeks to make those sums liable to indemnify him. The Plaintiff alleges that Mrs. *Cumpston* told him she would pay for the shares out of the savings she had placed in the bank, and it was upon the faith of this assurance that he paid the purchase-money for the shares. This brings the case within the decision of Lord Justice *Turner* in *Johnson* v. *Gallagher* (1), and that of Vice-Chancellor *Wood* in *Bolden* v. *Nicholay* (2). *Vaughan* v. *Vanderstegen* (3) establishes the same principle. And it was decided by Vice-Chancellor *Kindersley* in *Matthewman's Case* (4) that there was nothing to prevent a married woman contracting to take shares

(1) 3 D, F. & J. 494. 7 Jur. N.S. 273
(2) 3 Jur. (N.S.) 884.
(3) 2 Drew. 165.
(4) Law Rep. 3 Eq. 781 12 Jur. N.S. 452

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in a company upon the credit of her separate estate. Then, if Mrs. *Cumpston* is liable as regards her savings of separate estate for the purchase-money paid upon these shares, she is equally liable for all calls and liabilities which arose in respect of them. These savings include money invested in the names of the trustees without any intimation that they were to hold it upon the trusts of the settlement. The object of the lady was clearly to protect the money against her husband, and not to give up her control over it. The new shares which were allotted to her in other companies in respect of old shares, and which she paid for out of her savings, stand in the same position as the new shares in the *Leeds Bank*, and are equally liable for the claim made by the Plaintiff.

Mr. *Bagshawe*, for Mr. *Sheriff*, the trustee.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the Defendants Mr. and Mrs. *Cumpston*:—

The case of *Johnson* v. *Gallagher* (1), relied upon on behalf of the Plaintiff, is no authority, since Lord Justice *Knight Bruce* expressed a different opinion from Lord Justice *Turner*, and in that case the married woman was living apart from her husband, which entirely alters the principle laid down. But if Mrs. *Cumpston* contracted to purchase the shares in the first instance there is no reason why she should have intended to make herself liable for all future calls. If the shares had been sold at once while they were at a premium no liability would have attached to them. If she were ever so desirous of recouping the Plaintiff for what he has expended she is unable to do so out of her settled property, after the decision of Vice-Chancellor *Kindersley*. The money placed in the names of the trustees is clearly not liable, as it must be taken to have been so invested for the purpose of being held upon the trusts of the settlement, and is in the nature of an accretion to the trust property.

Mr. *Dunning*, in reply.

SIR R. MALINS, V.C:—

This is a case involving considerations of great importance, and it is one in which some innocent party must suffer. [His Honour

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(1) 3 D. F. & J. 494. 7 Jur. N.S. 273

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then stated the facts of the case, and referred to the expressed wish of the Defendant Mrs. *Cumpston*, that the Plaintiff should take up the new shares allotted in respect of the old shares, and her statement that she would pay for them out of the £350 at the bank, arising from the savings of her separate income. He then continued:—] That is a distinct contract by Mrs. *Cumpston* that she, a married woman, would take up the shares and pay for them out of a particular sum then standing at the bank, and admitted to have been savings arising from her separate estate, and that contract is one which, on every principle, can be enforced in this Court, and which is as binding on her in respect of her separate estate as if she were a *feme sole*. Authorities have been cited, and particularly the case of *Johnson* v. *Gallagher* (1). I was sorry to find that Lord Justice *Turner* and Lord Justice *Knight Bruce* did not take quite the same views of this branch of the law. My own judgment, however, entirely accords with the opinion of Lord Justice *Turner*. I think the rules laid down by him are founded in law and good sense, and there being a difference of opinion between the two Lords Justices, I should be at liberty to follow that which appeared to me most consonant with law, and if there had been no subsequent authority I certainly should have followed the rule laid down by Lord Justice *Turner*. But, fortunately, I am relieved from that difficulty, because in *Matthewman's Case* (2), where a married woman had agreed to take shares in this bank, and had paid for them out of her separate estate, and had taken them in her own name, she was held by Vice-Chancellor *Kindersley* to be liable as a contributory, and was kept on the list accordingly. I desire to be understood as entirely agreeing with the opinion expressed by the Vice-Chancellor in his judgment. He says (3):— "If a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which (if she were a *feme sole*) would constitute her a debtor, and in entering into such an engagement she purports to contract not for her husband but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable. And the question whether the obligation was contracted in the manner I have mentioned must depend upon the facts and circumstances of each particular case." Now, suppose this were a bill to oblige the lady out of her separate estate to pay the original purchase-money for these shares, £330, her contract was distinct that she would pay it out of the £350 at the bank arising from savings of her separate estate. Upon the rule, therefore, laid down by Vice-Chancellor *Kindersley*, this is a contract which she intended to be fulfilled out of her separate estate, and which the person with whom she contracts, Mr. *Butler*, so understood, and on that principle I should be bound to say that to the extent of the £330 the separate estate is affected by the contract and she must fulfil it.

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(1) 3 D. F. & J. 494. Jur NS
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(2) Law Rep. 3 Eq. 781.

(3) Law Rep. 3 Eq. 787.

But it is said, although she may be held liable for the £330, she never intended to make herself liable for any future calls. It is quite probable that she never expected there would be any further calls on these shares, because the bank had evidently induced the public to think that they were in so flourishing a condition that their shareholders would never be required to pay for anything but that which would produce a high amount of remuneration. But if she never expected to have any future calls, Mr. *Butler*, by taking these shares at the request of the lady, certainly never intended to render himself liable to this enormous amount of calls made in respect of these eleven shares; and it is perfectly clear that if future calls had been made for the purpose of increasing the capital, and they had been remunerative, the remuneration must have gone to the lady.

Therefore, the contract to take the eleven shares is a contract by this married woman, not only to take the shares but to bear all the burthen, at the same time that she has all the advantages of taking the shares, and with that must necessarily follow the obligation to pay all future calls. I consider, in point of law, that beyond all doubt she has entered into a contract which obliges her out of her separate estate, so far as she is not restrained from anticipation, to fulfil the contract to meet, not only £330, but every payment which those who act for her are called on to make in consequence of having made the first payment.

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Then, this obligation being thus, in my opinion, clear, it is argued that there is no property which can be resorted to beyond the sum of about £200 in Court to fulfil this obligation, and on that point the case is certainly not wholly free from difficulty. One of the difficulties presented is, that partly before and partly after the transaction in question, while going on saving money, she had from time to time placed that money in the names of the two trustees of her settlement, and it is argued that that is an addition to the original settlement, and therefore as the original settlement restrains her from anticipation with regard to that which it originally comprised, the same restraint attaches also to that which has been added to the trust fund. I admit that there is considerable force in that argument, but in order to put a construction on the acts of parties all the surrounding circumstances must be looked at. Now this was a lady who, I must infer from the frame of the settlement, had originally a large fortune, and the main object of the settlement is to secure to herself the property, to her separate use without power of anticipation, but it also secures to her husband an annuity of £500 per annum, she therefore was in a situation to save money, and has saved a large sum, and is still going on saving now. Being a married woman, she was desirous of protecting these savings, and to have the control of them against her husband, and without making any communication to the trustees of the settlement that she intended to add anything to the trust fund, but solely as a means of protecting herself against her husband, she put the funds produced from the money she had saved into the names of the trustees of her settlement. Am I to consider this necessarily as an addition to the settlement, so that all the trusts of the settlement attach to it, and so that this lady can no longer touch her own money? I do not think that that was her intention; but what she intended throughout was to have the control over these funds, and if she desired, to spend the money, or employ it in any way whatever. I think she throughout intended to reserve to herself the right to call upon the trustees to re-transfer it to her. In simply putting the money into the names of two persons there would be a resulting trust to herself, and I consider that she did this as a protection against her husband, and that the trustees held it for her separate use, she retaining the absolute dominion over it just as if she had had it in her own pocket. But there is another principle involved in the question. It is a settled principle that when a man marries a woman her property may be settled to her separate use without power of anticipation, or on her husband until he becomes bankrupt or insolvent, or does any act whereby it becomes payable to any other person, when the property of the wife may be made to go over; but if a man settles his own property on himself upon his marriage until he becomes bankrupt or insolvent, and then to go over to the family, that is decided to be invalid, because he cannot by such a form of settlement take the property out of the reach of his creditors. In analogy to that principle, this lady having, as between herself and the trustee, incurred the obligation, as solemn as ever was entered into, to indemnify him to the last farthing against any liabilities he might incur in acceding to her request to pay for these shares, I do not consider that she was at liberty by any transaction, without his consent, afterwards to take that property, which she had bound herself to let him have to fulfil the obligations, out of his reach, by making a settlement on herself to her own separate use without power of anticipation. In my judgment, that principle coming in aid, under all the circumstances of this case, she was not at liberty to make any settlement or arrangement which might take her separate property out of the reach of Mr. *Butler* to enable him to fulfil the obligation which he had entered into on her behalf, which was not only to take the shares, but on her behalf to pay every call that became due upon them. Therefore, I come to the conclusion that this lady is bound out of her separate estate to indemnify the Plaintiff against all calls made on the eleven shares in question, and I must declare that all money saved by her out of her separate income from that time downwards is applicable to fulfil this obligation, and there must be an inquiry to ascertain what that property is.

On that subject, I may simplify the inquiry in some degree by stating my impression with regard to the different parts of the property mentioned in the schedule to her answer. The property is classified, and first of all with regard to that part of her property where shares were settled by the original settlement, but not paid up in full, I consider that payments made in respect of shares settled will not be liable to indemnify the Plaintiff, but a sum of £96 was paid for new *Midland Railway* shares, much in the same situation as the shares in this bank; there were certain shares paid up in full which were settled, and there was no obligation attached to them. The company could enforce no further payment, but making an allotment of new shares the company, as usual, gave their own shareholders the first opportunity of taking them; and this £96 having been paid by the wife in respect of no obligation, but because she had the right to take the shares if she thought fit, I cannot consider that as a payment in pursuance of any obligation incurred by the settlement, and that money must be treated as money now held to her separate use. The other items of the same class will also be subject to the demand. I consider all property which she has in her own possession in the bank, or which she has placed in the names of the trustees, arising from the savings of her separate estate, as being her separate estate still. You may take a declaration that the Defendant is bound out of her separate estate to indemnify the Plaintiff against the original purchase-money for the shares, £330, and all calls already made, or hereafter to be made, in respect of those eleven shares.

I give the costs up to the hearing against the Defendant, and I decide that she is bound out of her separate estate to pay the costs of the suit.

I shall give the husband no costs on account of his conduct in supporting his wife in taking so improper a course as resisting this demand.

Solicitor for the Plaintiff: Mr. *H. B. Clarke.*
Solicitors for the Defendants: Messrs. *Singleton & Tattershall.*
Solicitors for the Trustee: Messrs. *Palmer, Eland, & Nettleship.*

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Will—Lapsed Devise—Descent Cast—Mortgage Debt—Locke King's Act (17 *&* 18 *Vict. c.* 113)—*Amendment Act* (30 *&* 31 *Vict. c.* 69).

A heir-at-law and customary heir of a testator, taking by descent an estate which has been the subject of a lapsed devise in the will, is not a person claiming "under or by virtue of a will" within the meaning of the proviso contained in the 17 & 18 Vict. c. 113, s. 1.

38 L.J.S
443
13 Eq. 223.
13 ChD 356

DEMURRER.

John Nelson made his will dated the 13th of August, 1835, and at the outset of it gave the following direction:

"I direct that all my just debts, funeral and testamentary expenses, shall be paid by my executors hereinafter named, as soon as conveniently may be after my decease."

He then made several devises and bequests, and finally devised and bequeathed to his mother, *Ann Nelson*, her heirs, executors, administrators, and assigns, all the rest, residue, and remainder of his estate and effects for her and their own use and benefit.

Mrs. *Nelson* and the executors named in the will all died in the testator's lifetime.

In 1842 the testator purchased a freehold and copyhold estate in *Essex*, which in 1848 he mortgaged for £2500 and interest.

On the 23rd of July, 1868, he died.

His heir-at-law and customary heir, *James Crighton Nelson*, on the 2nd of November, filed this bill against *Henry Page* and *Rebecca* his wife, to the latter of whom administration of the estate and effects had been granted, praying for a declaration that the Plaintiff was entitled to have the mortgage debt paid out of the personal estate.

The Defendants demurred.

Mr. *G. Hastings*, for the demurrer:—

The Plaintiff claims to be exempted from the operation of Mr. *Locke King's Act* (17 & 18 Vict. c. 113), as being "a person claiming under or by virtue of a will made before the 1st of January, 1855," within the proviso at the end of that statute. We say he is not exempted, because he is a person claiming, not under, but against the will.

Neither is he exempted by force of the direction contained in the will, for by the *Amendment Act* (30 & 31 Vict. c. 69), in the construction of the will of any person who may die after 1867 a direction of this kind is not to be deemed a declaration of an intention contrary to the rule established by Mr. *Locke King's Act.* In other words, the effect of the decisions in *Eno* v. *Tatam* (1), *Moore* v. *Moore* (2), and that class of cases, has been done away with by the statute of 1867.

Mr. *Dauney*, for the Plaintiff:—

The rights of the Plaintiff, who, as heir of the testator, claims this estate as a lapsed devise in a will made prior to 1855, are, by the proviso in Mr. *Locke King's Act*, left unaffected by that statute.

It so happens that the only part of this will which is now operative, is this direction as to the payment of debts. Why should not the heir claim the benefit of this direction? To the extent of the lapsed devise he is a legatee, and in that sense is a person claiming a right under the will. That such a direction was formerly a sufficient indication of intention to exonerate an estate in mortgage is established by *Eno* v. *Tatam*, and *Moore* v. *Moore;* and although the statute of 1867 declares that such a direction is no longer to be evidence of such an intention, yet as that statute is described in the title as an explanatory (not an amending) Act, it must be read with, and as forming part of, the former. Although, therefore, the Act of 1867 is in terms made applicable to the wills of all persons dying after 1867, that expression must be controlled by the language of the original Act, which excludes from the operation of the former (and, therefore, of both) the rights of any person claiming under a will made prior to 1855. So that to this case neither of the two statutes has any application.

Sir G. M. Giffard, V.C.:—

There can be no doubt that under the old law, supposing that

(1) 32 L. J. (Ch.) 159; 9 Jur. (N.S.) 225; 1 N. R. 256.
(2) 1 D. J. & S. 602.

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neither of these Acts had been passed, this heir would clearly have been entitled to exoneration.

Then came Mr. *Locke King's Act;* and the facts to which we have to apply the provisions of that statute are, that the will was made before the 1st of January, 1855; but the person who claims this property as heir claims it as the heir of a person who did not die till after 1867. Now Mr. *Locke King's Act* provides in substance as follows:—that when any person shall, after 1854, die seised of land charged with a mortgage debt, and such person shall not by his will have signified any contrary or other intention, the heir or devisee to whom such land shall descend or be devised shall not be entitled to have the mortgage debt discharged out of the personal estate. There if we stop, without going to the following proviso, it is plain that heirs and devisees are both within the Act. But then comes the proviso that nothing therein contained shall affect the rights of any person "claiming under or by virtue of any will" made before the 1st of January, 1855. Now it is plain that this proviso extends to the case of a devisee only. It is plain that the only person intended to be excepted by this proviso out of the Act, is a devisee under a will made prior to 1855. It follows, therefore, that this heir comes within the operation of the statute, although the devisee, had she lived, would not have done so.

Then comes the question, whether, in these two Acts taken together, there is to be found anything which will take away the effect of the declaration to be found at the commencement of this will, that all the testator's just debts are to be paid by his executors out of his personal estate. We all know the direction which was given to the current of the decisions on this subject. There were, at length, so many of them that they came to be established as law, and in the end gave rise to the passing of the statute of 1867. I think the language of that statute is reasonably plain, though it is not perhaps so happily expressed as it might be.

The Act of 1867 says that in the construction of the will of any person who may die after 1867, a general direction that the debts shall be paid out of the personal estate shall not be deemed to be a declaration of an intention contrary to the rule established by Mr. *Locke King's Act,* unless such contrary or other intention be

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further declared by words expressly or by implication referring to all or some of the testator's mortgage debts. The meaning of that appears to be this—that if a testator wishes to give a direction which shall be deemed a declaration of an intention contrary to the rule laid down by Mr. *Locke King's Act*, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakeably to refer to or describe them.

I cannot say that there is in this will a direction of that kind, and I cannot, therefore, hold that the estate, in the hands of this heir, is exonerated from payment of the mortgage debt.

The demurrer must therefore be allowed.

Solicitor: Mr. *Francis Broughton.*

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GREEN *v.* WYNN.

Principal and Surety—Surety for Interest only—Release by Creditor, reserving Remedies against Third Parties.

7 C.P. 11-2-4,

In a mortgage deed a third party joined as surety, but for the due payment of interest only, and the principal and surety entered into a joint and several covenant with the creditor to pay the interest. Afterwards the debtor executed a deed registered under the *Bankruptcy Act*, 1861, whereby he assigned all his property upon trust for creditors, and the creditors released the debtor from all debts, with a proviso that nothing therein contained should affect any mortgage held by any creditor, or any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor either alone or jointly with any other person:—

Held, that the effect of the deed was to give a qualified release, and not to extinguish the debt; and that the remedy of the creditor against the surety for interest, was not barred.

Affd by L.C 4 Ch 204

THIS was a bill by a surety to restrain an action.

By an indenture dated the 23rd of April, 1866, and made between *Thomas Green* the younger (the principal debtor) of the first part, the Plaintiff, *Thomas Green* the elder (the surety), of the second part, and the Defendant, *Henry Bertie W. W. Wynn*, of the third part, after reciting a lease of certain premises to *Thomas Green* the younger, and that he had erected certain buildings thereon, and that the Defendant had agreed to advance to *Thomas*

Green the younger the sum of £1000 upon having the repayment of the same, with interest, secured in manner thereinafter appearing, and that as a security for the payment of interest the Plaintiff had agreed to enter into such covenants as were therein contained, it was witnessed that in consideration of £1000 advanced to *Thomas Green* the younger by the Defendant, *Thomas Green* the younger covenanted with the Defendant that he would, on the 23rd of July, 1866, pay to the Defendant £1000, with interest at £10 per cent. per annum. And *Thomas Green* the younger thereby assigned the premises comprised in the lease to the Defendant, subject to a proviso for surrender on payment of £1000 and interest on the 23rd of July, 1866. The deed then contained a joint and separate covenant by *Thomas Green* the younger and the Plaintiff, with the Defendant, that "if the sum of £1000, or any part thereof, shall remain unpaid," they or one of them, their or his heirs, executors, or administrators, would, "so long as the same sum, or any part thereof, shall remain unpaid," pay to the Defendant, his executors, administrators, or assigns, interest for the said sum of £1000, "or for so much thereof as shall for the time being remain unpaid," at the rate of £10 per cent. per annum, by equal quarterly payments on the 23rd of October, the 23rd of January, the 23rd of April, and the 23rd of July; the first to be made on the 23rd of July then next. The deed also contained a power of distress for arrears of interest, and a power of sale.

On the 31st of December, 1866, *Thomas Green* the younger executed a deed of assignment in favour of creditors under the 192nd section of the *Bankruptcy Act*, 1861, which was afterwards duly registered. By this deed, after reciting that the debtor, "being unable to pay to his creditors the amounts due to them respectively," had agreed to make the assignment thereinafter contained upon having such release as was thereinafter contained, it was witnessed that the debtor thereby assigned to a trustee all his real and personal estate upon trust to sell and convert, and out of the proceeds to pay costs, charges, and expenses, and then upon trust as follows: "And shall pay and divide the clear residue of the said moneys unto and among all and singular the creditors of the said debtor, whether such creditors shall or shall not execute these presents, rateably and in like manner as if the said debtor had been, on the day of the date of these presents, duly adjudged bankrupt." The indenture then also witnessed that, in consideration of the assignment thereinbefore contained, the creditors did respectively thereby acquit, release, and discharge the debtor, his heirs, executors, and administrators, "of and from all and singular the debts due to them respectively by the debtor," and all actions, suits, &c. The deed then contained the following proviso:—

"Provided always, that nothing herein contained shall in any way invalidate, prejudice, or affect any mortgage, charge, or other specific lien or security held by any creditor of the said debtor, or any right or remedy which any such creditor may have against any other person or persons in respect of any debt due by the said debtor either alone or jointly with any other person or persons, or any part thereof."

An action having been, on the 23rd of June, 1868, commenced by the Defendant against the Plaintiff for £25, the amount of one quarter's interest due on the 23rd of the previous April, this bill was filed in July for an injunction to restrain further prosecution of the action; and the action had been stayed, the Plaintiff undertaking to abide by any order the Court might make with regard to the £25.

Mr. *Druce*, Q.C., and Mr. *Caldecott*, for the Plaintiff:—

This is an absolute release, not a mere covenant not to sue, and the principal debt is extinguished. That being so, a right to proceed against the surety cannot, on general principles, be reserved: *Nicholson* v. *Revill* (1).

Apart from the general rule—here the surety was liable for interest only, and if the debt be gone, the interest must fall likewise. It cannot have been the intention of the parties that the surety should go on for all time paying interest on a debt after it had been extinguished.

This being a deed of assignment out and out, not merely of composition, and binding all creditors, is, as Lord Justice *Wood* (then Vice-Chancellor) held in *Webb* v. *Hewitt* (2), an actual sale of the debtor's estate in consideration of a release from the debts.

(1) 4 Ad. & E. 675.

(2) 3 K. & J. 438.

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Then, to use the language of the judgment in *Webb* v. *Hewitt* (1), it follows that "the debt is gone in equity, and it is impossible to reserve a right against the surety in such a transaction as that." The proviso in this deed cannot apply, for, as the Vice-Chancellor observed (2), "I hold that if such a reservation of right had been put in, it would have been a nullity. If a man, in consideration of the debt due from his principal debtor, agrees to buy the whole of the debtor's property, he has been paid; and if he has been paid, he cannot reserve his rights."

The VICE-CHANCELLOR:—Are not mortgages to be kept alive?

Mr. *Druce*:—The mortgage is kept alive for the benefit of the person holding it. The Plaintiff here has no right of redemption. He could not compel the Defendant to take his money, as the Defendant might say that a perpetual annuity of £100 a year was better than £1000.

The decisions at law are all confined to cases where the debt was a debt due at the date of the release. Here the surety is being sued for what was not due at the date of the deed, namely, interest. This case, then, stands apart from the decisions. In other words, this proviso does not comprise the case of this surety.

Mr. *Kay*, Q.C., and Mr. *Whately*, for the Defendant:—

The release must be construed with the proviso. Taken together they mean that the release is to be cut down to a mere covenant not to sue. That takes the case completely out of *Webb* v. *Hewitt* (3), which only decides that if the debt be gone, it is too late to sue the surety. That the effect of a proviso of this kind will be to reduce the release to a covenant not to sue appears from *Price* v. *Barker* (4), *Keyes* v. *Elkins* (5), and *Andrew* v. *Macklin* (6).

But then it is said, that here there is a *cessio bonorum*, which makes it a case of sale. The deed, however, holds out no expectation of a surplus. It contemplates a distribution as in bankruptcy. This, therefore, is not a sale and purchase, as in *Webb* v. *Hewitt*.

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(1) 3 K. & J. 444.
(2) Ibid. 445.
(3) Ibid. 438.
(4) 4 E. & B. 760, 779. 1 Jur. N. 775
(5) 5 B. & S. 240, 250.
(6) 6 Ibid. 241.

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In *Ex parte Carne* (1), the right to recover from the sureties was assumed throughout.

In *Johnson* v. *Barratt* (2) the Court held a deed valid though it did not reserve rights against sureties; but only on the ground that in that instance it was not shewn there were any creditors secured by sureties.

Further, this is a sum of money charged on land, and in all such cases interest may continue to be chargeable though there be no personal covenant to pay the principal, as in the case of trustees under the *Succession Duties Act*, and others.

The remedy of the surety is to have an account against us, and when his principal, interest, and costs are paid, he may stand in our shoes as against the land.

[*Browne* v. *Carr* (3) was also referred to.]

Mr. *Druce*, in reply.

SIR G. M. GIFFARD, V.C.:—

The question in this case is, whether the Plaintiff, who is a surety, is released or not? If he be released, he is of course entitled to an injunction; if he be not released, the bill must be dismissed.

The first and main authority relied on by the Plaintiff is *Webb* v. *Hewitt* (4). That decision appears to me to have proceeded entirely upon this, namely, that there had been a contract between the principal debtor and the principal creditor that a certain transaction should amount to payment and extinguishment. That being so, it is unnecessary to allude to that case further, as it has no application to the present.

Then as to the other cases, one may say what they amount to in a very few words. From *Solly* v. *Forbes* (5) down to the more recent cases that have been cited the rule has always been this: that you may suspend your right to proceed against the principal debtor, and yet proceed against the surety; and that even if you put into your deed words which, standing alone, amount to a release, the Court will not give that effect to them, but will take the whole of the deed together, and effectuate that which was the real intention of the parties.

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(1) Law Rep. 3 Ch. 463.
(2) Ibid. 1 Ex. 65; 11 Jur. N.S. 1023
(3) 2 Russ. 600.
(4) 3 K. & J. 438.
(5) 2 Brod. & B. 38.

That being so, what is it that we have here? Not, I quite agree, a state of things exactly the same as if it had been an ordinary case of two persons being jointly and severally liable for the same debt. The deed is a mortgage, under which the principal debtor covenants to pay the principal with interest at 10 per cent. upon a given day. Besides that, there is this joint and several covenant between *Green* the son and his father, the Plaintiff, with the Defendant, "that if the sum of £1000, or any part thereof, shall remain unpaid," they, the son and the father, or one of them, will "so long as the same sum or any part thereof shall remain unpaid," pay to the Defendant interest for the said sum of £1000, "or for so much thereof as shall for the time being remain unpaid," at the rate of £10 per cent. Then we go to the deed which is relied on as a release, and the way to look at the transaction is to consider what was the intention of that deed. It is manifest, I think, what that was. The deed is, first of all, an assignment of all the debtor's property upon trust to divide the same equally amongst his creditors. Then there is what in terms is a release; and then there comes this proviso:—[His Honour read the words of the clause.]

Now is, or is not, this "a right" which the creditor has "in respect of a debt due by the debtor?" If, again, you look in the most minute and technical way at the form of the covenant, it is a covenant for the payment of interest in respect of this very debt of £1000. No doubt there is a difference between the ordinary form and this form of covenant; but I cannot hold, nor do I see any reason for holding, that there is the slightest difference in effect. I cannot have the least doubt that the intent of the deed of the 31st of December, 1866, was to give a qualified release, or rather a suspension of right to proceed, to this extent only, that whenever any person in respect of any debt had a remedy against any other person than the assignor, then that remedy should be reserved. I think that is clearly expressed in the proviso at the end of this deed; and that being so, the bill must be dismissed.

I have no hesitation in saying that though there may in words

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be a distinction between this case and *Solly* v. *Forbes* (1), and that class of cases, in substance and effect there is neither distinction nor difference.

The bill must be dismissed with costs, including the costs of the motion; payment of the £25 and costs of the action must be ordered upon the undertaking.

Solicitors for the Plaintiff: Messrs. *Harcourt & MacArthur.*
Solicitors for the Defendant: Messrs. *Birch & Ingram.*

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5 Ch 279, 280,-1, 282,-3,-4,-6

9 Eq 331,-2.

MORRIS *v.* ASHBEE.

Copyright—Directory—Paid-for Insertions—Advertisements.

In a trades directory, those persons who chose to pay for the privilege got their names printed in capital letters, with additional descriptions of their trade or business, called "extra lines":—

Held, that such payment had not the effect of making the information common property, so as to enable the compiler of a rival directory to reprint it from slips cut from the first, even where the persons whose names were so printed had been applied to to verify the information contained in the first directory, and had not only authorized but had actually paid for the insertion of their names in the second, with the distinctive features of capital letters and extra lines.

Injunction granted, but not to extend to advertisements distinct from the body of the work.

THIS was a suit by the proprietor and publisher of "*The Business Directory of London*," for the purpose of restraining the publication of "*The Merchants' and Manufacturers' Pocket Directory of London*, 1868," on the ground that it was a piracy of the Plaintiff's work.

Towards the end of 1862 the Plaintiff composed, and first published, "*The Business Directory of London for* 1862—1863," containing the names and occupations of the merchants, traders, and other persons carrying on business or residing in *London* and parts adjacent, the names being contained in a classified list of the various trades and professions, arranged in alphabetical order, and also in another list in the alphabetical order of the names.

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(1) 2 Brod. & B. 38.

Editions with improvements and alterations, the result of study and labour on the part of Plaintiff, were published at the end of each succeeding year.

Besides containing a classified list of trades, and also a division containing the surnames of merchants and traders arranged alphabetically, the Plaintiff's book was made the medium for advertisements, it being his custom to print in capital letters the names of all such persons in trade as were willing to pay 1*s.* for this advertising privilege, the names of persons not making this payment being printed in small letters. Persons were also entitled by payment to have a fuller description of their business, called "extra lines," inserted immediately after their names, and also, on a proportionate payment, to have their advertisements inserted either at the end or in the body of the work, opposite to their names.

The Defendants had been in the employment of the Plaintiff as clerks and canvassers until April, 1867, when they were discharged for refusing to give an undertaking not to join the Defendant *Simonson* (who had also been in Plaintiff's service) in bringing out a rival directory.

On sending out his canvassers in the summer of 1867, to ascertain what alterations had taken place, and to solicit subscriptions for advertisements and "extra lines" for the edition of 1868, the Plaintiff found that his canvassers had been anticipated by the Defendants, who had obtained orders for their intended new directory, and payment for capital letters and extra lines, from several of the persons who had hitherto been in the habit of paying the Plaintiff for this mode of advertisement.

In January, 1868, the Defendants published their directory, "*The Merchants' and Manufacturers' Pocket Directory of London*, 1868," which was alleged by the bill to be a piracy of the Plaintiff's work in general plan and arrangement, and also to have been to a great extent printed from slips cut from the last year's edition of Plaintiff's directory, with merely colourable variations, or such alterations as had occurred in names and addresses in the course of the year. In evidence of the alleged piracy, a long series of instances was given, in which inaccuracies appearing in Plaintiff's work were reproduced in that of the Defendants.

The Plaintiff was himself, in March, 1866, restrained by injunction from pirating *Kelly's Post Office Directory*, in a directory published by him, and called "*The Imperial Directory of London*, 1866" (1).

The evidence on behalf of the Defendants was very voluminous, and was directed to the following points:—1. That the Plaintiff had used the works of other persons, and especially *Kelly's Post Office Directory*, to a much greater extent than Defendants had used that of Plaintiff, and, in particular, that the use of capitals and extra lines was not an original design of Plaintiff, but adopted by him from a directory published at *New York*. 2. That the Defendants had confined themselves to cutting from Plaintiff's book the paid-for matter (the capitals and extra lines) in which the Plaintiff was not entitled to any copyright, and that he had himself, in March, 1867, admitted to the Defendants the right of any one to cut out the paid-for portions of his directory and use them for a new directory. Moreover, the slips cut from Plaintiff's directory for 1867 were taken before the 18th of April, 1867, when the work was first registered. 3. That the Defendant's directory was different from the Plaintiff's in size and form, being much smaller, and shewing only the principal merchants and traders; and, further, that no name, address, or business particular appeared in their directory other than of persons canvassed by their agents, who were instructed to call upon all persons whose names appeared in Plaintiff's directory printed in capitals, and obtain, if possible, business cards or manuscript particulars of the name, address, and occupation of the person canvassed, the agents being furnished with printed cuttings from other works to verify the information therein contained, and obtain, if possible, the necessary payment for putting in capitals and extra lines. In this manner every single entry of such names, particulars, and addresses in Defendant's directory was the result of particular inquiries made by them at the place of business. 4. In order to account for the coincidence of errors and abbreviations in the two works, it was asserted by the Defendants that these were errors of the printer, the result of accident, the pressure under which the work was brought out, and hasty correction of proofs.

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(1) *Kelly* v. *Morris*, Law Rep. 1 Eq. 697.

Mr. *W. M. James*, Q.C., and Mr. *Speed*, for the Plaintiff:—

In the case of a directory, road-book, or dictionary, there is no piracy in using common sources of information; but no man is entitled to take the results of my labour, or to compile his work by the assistance of mine in order to save himself labour and expense in getting his information; the only use that he can legitimately make of a previous publication being to verify his own calculations and results when obtained. The Defendants admit that they have printed large portions of their work from slips cut from the Plaintiff's directory, and this being so the case falls entirely within the principle of *Kelly* v. *Morris* (1).

Mr. *Kay*, Q.C., and Mr. *F. T. White*, for the Defendant:—

There can be no copyright in the mere arrangement and plan of the Plaintiff's work, which is not original in this respect. As to the capitals and extra lines, the only portion that has been in any way taken from the Plaintiff's work, no copyright can be asserted by the Plaintiff. It is mere advertisement, which has been paid for, and conveys no exclusive right to the Plaintiff as the first advertiser. If the person who has paid for the insertion of his name in this particular manner, say with some fanciful adjunct such as "Who's *Griffiths?*" has the right again to print or advertise his name in the same manner, can it be denied that he has the right to authorize others to do so? The Defendants have been so authorized, and have published nothing but what they have received payment for publishing. *Kelly* v. *Morris* is distinguishable, as what was there taken from *Kelly's Directory* was matter which had not been paid for, but was information acquired by the labour and outlay of *Kelly*. But even if the Defendants have made an improper use of Plaintiff's directory, the Court will not grant an injunction, as the conduct of the Plaintiff in pirating from *Kelly* and other works, and in encouraging the Defendants to do what they have done by admitting to them that there was no copyright in the paid-for portion of a directory, has led to the act complained of: *Saunders* v. *Smith* (2).

[On being referred to the evidence on this point, the Vice-Chancellor held that the issue of piracy committed by the Plaintiff

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(1) Law Rep. 1 Eq. 697.

(2) 3 My. & Cr. 711.

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was not sufficiently raised by the Defendants' affidavits, which in no way alleged that the particular things of which the Plaintiff complained, the capitals and the extra lines, were pirated.]

They also contended that there was no proof of any damage sustained by the Plaintiff from the conduct of the Defendants.

Mr. *James*, in reply.

Nov. 10. SIR G. M. GIFFARD, V.C.:—

The Plaintiff in this suit has filed his bill, alleging himself to be entitled to the copyright of a book called the *Business Directory of London*, and he seeks to restrain the Defendants, who have published a directory called the *Merchants' and Manufacturers' Pocket Directory of London*, from infringing that copyright. The Plaintiff asserts that the Defendants have adopted a substantial part of the plan of his work, that they have pirated many passages from it, and that their directory is to a great extent printed from slips cut out from the edition of his work for the year 1867. As evidence of this he adduces, among other things, a series of instances in which the inaccuracies in his work and that of the Defendants are identical. The Plaintiff has given the usual *primâ facie* proof of his copyright. The Defendants have satisfied me that the Plaintiff has no grounds for complaining of their having taken the plan of his work; but it is necessary to examine the defences which they have made on the other part of the case. These defences may be conveniently considered under two heads, one having reference to what the Defendants allege has been the Plaintiff's conduct; the other to the rights which the Defendants claim with respect to the entries in the Plaintiff's directory, for the insertion of which he was paid.

[His Honour, after referring at length to the evidence on these points, continued:—]

I have now gone through the most material substance of the affidavits, both on the one side and the other, under the two heads to which I have referred. Under the first, in order that the defence should prevail, it must be made out that there is proof of at least one of three propositions—viz., either that the Plaintiff

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authorized what was done by the Defendants, or that his conduct conduced to what was done by them, or that there is enough to displace the *primâ facie* proof of the Plaintiff's copyright In my opinion no one of these propositions has been made out in point of fact. As regards the first two propositions, the utmost that can be at all fairly deduced from the evidence as against the Plaintiff is that there was a conversation in which he expressed an opinion which coincides with the view of the law taken by the Defendants, and that on another occasion he told the Defendant *Simonson* that advertisements might be used by any one. I am satisfied that the Plaintiff put *Simonson* completely at arm's-length after this. But if this had not been so, a copyright is not to be lost by the mere expression of an opinion; and as regards the other conversation, the advertisements referred to cannot be taken to mean the names in capital letters or the names with the lines added to them, but clearly point to the distinct and separate advertisements which were either at the end of the directory or on the pages opposite the list of names, all standing alone, and with respect to which blocks were in many instances provided by the advertiser, and in many instances sent for by and actually handed to the Defendants. Therefore neither of the first two propositions is made out, nor is the third, for in the first place the Plaintiff's copyright is not in terms denied, or its existence distinctly put in issue; and in the next, but one specific instance of the specific matter alleged to have been taken from the body of *Kelly's Directory* is adduced, and that is stated to be taken from twenty-three different places all relating to the same firm. The rest of the evidence on this point either refers to the separate advertisements, or is loose general assertion met, and, in my opinion, sufficiently met, by counter evidence; and when it is borne in mind that we have to do with the *Business Directory* and not with the *Imperial Directory*, that *Kelly* proceeded successfully against the *Imperial Directory*, but never complained of the *Business Directory*, and that the mode in which the *Business Directory* was compiled at the commencement, and in each year subsequently, is plainly and consistently deposed to, I have no hesitation in coming to the conclusion, as the fair result of the evidence, that the *Business Directory* was not pirated, and was so compiled as to entitle the Plaintiff to sustain his bill.

Then there remains the last head of defence: with reference to this the Plaintiff brings forward some instances in which the Defendants have taken something more, though perhaps not very much more, than the names in capital letters or the names with added lines, but enough, and more than enough, of the names in capital letters and of the names with added lines have been taken to constitute a piracy in respect of which this Court will interfere. Therefore there must be an injunction, unless, as was contended, the Plaintiff either has no copyright in these, or unless the mode in which the Defendants have applied to the several persons whose names have been inserted, getting payments and authority or directions from them, is enough to justify what they have done. On the first of these two points I am of opinion that the application by the Plaintiff for payment, and the payment by the several persons whose names were inserted with capital letters or with added lines had not the effect of making these names, when so inserted, common property. The Plaintiff incurred the labour and expense first of getting the necessary information for the arrangement and compilation of the names as they stood in his directory, and then of making the actual compilation and arrangement, and, though each individual who paid might no doubt have his own name printed in capital letters or with the same superadded lines wherever he chose, neither one nor all of them could authorize the cutting of a series of slips, or the taking of the names as arranged, from the Plaintiff's directory, and the use of them in the printing of a rival work. This brings me to *Kelly* v. *Morris* (1). In that case, no doubt, *Morris's* canvassers did more than anything that has been proved to have been done by, or on the part of, the Defendants, for in *Kelly* v. *Morris*, if the canvassers did not find the occupier of the house at home, or could get no answer from him, then the information copied was reprinted bodily. Neither the decree, however, nor the judgment, is based solely on or confined to this. The decree is general in its terms, following *Lewis* v. *Fullarton* (2), and the substance of the judgment is, that in a case such as this no one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labour of working

5 Ch 285

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(1) Law Rep. 1 Eq. 697.

(2) 2 Beav. 6.

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out and arriving at these results by some independent road. If this was not so, there would be practically no copyright in such a work as a directory. Moreover, it is not necessary for me to define the extent to which the Defendants might have gone, or may go, in using the Plaintiff's directory. What I have to determine is, whether they could lawfully do what they actually did. Now it is plain that it could not be lawful for the Defendants simply to cut the slips which they have cut from the Plaintiff's directory and insert them in theirs. Can it then be lawful to do so because in addition to doing this, they sent persons with the slips to ascertain their correctness? I say, clearly not. Then, again, would their acts be rendered lawful because they got payment and authority for the insertion of the names from each individual whose name appeared in the slips? And to this I again answer, clearly not. The simple upshot of the whole case is, that the Plaintiff's directory was the source from which they compiled very material parts of theirs, and they had no right so to resort to that source. They had no right to make the results arrived at by the Plaintiff the foundation of their work or any material part of it, and this they have done. It was suggested that there can be no damage; this is not so; and for the reasons I have given there must be an injunction and decree, as in *Kelly* v. *Morris* (1) and *Lewis* v. *Fullarton* (2), with costs, with this proviso, that the injunction is not to extend to the advertisements which appeared at the end of or on separate pages of the Plaintiff's work as distinct from the list of names in the body of it.

Solicitors: Messrs. *Benham & Tindell;* Mr. *G. White.*

(1) Law Rep. 1 Eq. 697.

(2) 2 Beav. 6.

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Nov. 5.

FOULKES *v.* DAVIES.

Supplemental Bill—Supplemental Statement—Amendment—15 & 16 *Vict. c.* 86, *s.* 53—*Cons. Ord.* XXXII., *Rule* 2—*Alternative Relief.*

Plaintiff filed a bill, alleging that whilst suffering from bodily infirmity she executed, in favour of the Defendant, a deed of which she had no copy, and which the Defendant refused to produce, and praying that it might be delivered up to her to be cancelled. She then filed a second bill stating the above facts, and that she had since obtained inspection of the deed, and, finding that it contained a power of new appointment in her, had made an appointment under it to herself absolutely; also that the Defendant, by his answer in the former suit, claimed to hold the deed as trustee, and praying that, in case it should appear to the Court on the hearing of the former suit that the deed ought not to be declared void as thereby prayed, it might be declared that the Plaintiff was entitled to the possession of it, and that it might be ordered to be delivered up to her; also, that the second suit might be heard with, and might, "so far as necessary or proper," be treated as supplemental to the former.

Demurrer to the second bill overruled.

DEMURRER.

The bill, filed the 27th of June, 1868, stated as follows:—

The Plaintiff, *Ann Foulkes*, spinster, who was entitled to freeholds worth about £800 a year, having some ten years ago become partially paralyzed, was unable actively to manage her property, and employed for that purpose the Defendant, *John Pryce Davies*, her first cousin once removed. From about 1863 to July, 1869, he audited her rent accounts, gave directions to her land agent, and prepared and witnessed all cheques drawn by her, and which she, being unable to write, was accustomed to mark with a cross with her left hand. During this period Plaintiff employed a Mr. *Howell* as her solicitor.

In June, 1867, the Plaintiff, at the request of the Defendant, executed a deed, of which, at the time of her filing the bill in a former suit of *Foulkes* v. *Davies*, she had no copy, and of the contents of which she was then ignorant, but which she then believed to be either an irrevocable deed of gift in favour of the Defendant, or a deed confirming irrevocably some will or wills in his favour.

In July or August, 1867, the Plaintiff instructed Mr. *Edward Maurice Jones*, her present solicitor, to obtain the deed for her, and also her bankers' pass-book and some papers belonging to her, in the Defendant's possession, but they were not delivered up.

Further demand for the delivering up of the deed failing, the Plaintiff, on the 6th of February, 1868, filed the former bill against the Defendant, praying that the deed might be declared to be void, and that the Defendant might be ordered to deliver it up to the Plaintiff to be cancelled, together with the wills, codicils, bankers' pass-books, cheque book, receipts and other papers. Inspection of the deed was obtained under the common order on the 19th of March, 1868, when it appeared that it gave the Plaintiff an absolute power of appointment (the Defendant being trustee), and in default of such appointment, was a deed of gift of all her real and personal estate to the Defendant absolutely, subject to the payment of some legacies and small annuities.

By a deed-poll dated the 24th of March, 1868, the Plaintiff, in exercise of the power, appointed all the premises comprised in the deed to her own absolute use and benefit.

On the 21st of April, 1868, the Defendant filed his answer in the first suit of *Foulkes* v. *Davies*, in which he submitted that the deed was binding on the Plaintiff, and that he, as trustee, was bound to maintain its validity.

On the 6th of May, 1868, Mr. *Jones* wrote to the Defendant's solicitor, expressing regret that the Plaintiff had been unable until discovery had been obtained in the suit, to learn that the deed contained a power of revocation, stating that as she had executed the power, it had become immaterial whether she was or was not entitled to have the deed set aside, and that the Plaintiff had been advised to waive all claim to costs, and to consent to an order for staying further proceedings upon the terms of the deed and other documents mentioned in the affidavit of documents being given up; and offering to put an end to the suit on these terms.

This offer having been, on the 26th of May, declined by the Defendant's solicitor, the Plaintiff filed the present (or second) bill, stating as above; that the Defendant claimed to be entitled to retain the deed in his custody as trustee, " whereas the Plaintiff charges the contrary,' and assuming the said indenture to be valid and binding, and not liable to be declared void as in the said" (*i. e.* the former) " suit is prayed, the Plaintiff is entitled as the sole absolute beneficiary thereunder to have the same delivered up to her."

This bill then prayed:—"1. That in case it shall appear to this honourable Court on the hearing of the said first suit of *Foulkes* v. *Davies* that the said indenture of the 3rd day of June, 1867, ought not to be declared void, as in that suit is prayed, but ought to be regarded as valid and binding, then that it may be declared that the Plaintiff is entitled to the possession of the said indenture of the 3rd day of June, 1867, and that the Defendant may be ordered to deliver the same up to the Plaintiff. 2. That this suit may be heard at the same time with, and so far as necessary or proper may be treated as supplemental to, the said first suit of *Foulkes* v. *Davies*."

The Defendant demurred for want of equity.

Mr. *Kay*, Q.C., and Mr. *Owen*, for the demurrer:—

The Plaintiff is wrong in having filed the second bill. The former bill should have been amended (15 & 16 Vict. c. 86, s. 53); or, if the cause were not in such a state as to allow of amendment, a supplemental statement should have been filed (Cons. Ord. XXXII. Rule 2). By the old practice it was a strict rule that newly discovered facts, if they occurred before the filing of the original bill, could not be introduced by supplemental bill.

But this bill must fail on other grounds. Taken with the former, it presents an alternative case. It impeaches a deed on the ground of fraud, or if the Court should consider the deed valid, it prays relief under it. Such a bill was dismissed in *Myddleton* v. *Lord Kenyon* (1), the case of fraud failing, but without prejudice to a suit solely for an account.

So in *Kendall* v. *Beckett* (2), Lord *Brougham* said that a Plaintiff could not be permitted to introduce into the corner of a bill some secondary or trivial claim, on which if it stood alone he might be entitled to succeed, in order, as it were, to catch a decree on a minor point, in the event of his failing in the main object of his suit. In *Rawlings* v. *Lambert* (3) a demurrer was allowed under similar circumstances.

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(1) 2 Ves. 391.

(2) 2 Russ. & My. 88.

(3) 1 J. & H. 458.

As this relief could not have been granted, if prayed by an original bill, the supplemental suit must fail.

Mr. *Druce*, Q.C., and Mr. *Haynes* for the bill :—

This second bill is founded on the fact of the appointment by the Plaintiff, a deed which was not in existence when the former bill was filed. So that we could not have amended the original bill.

The whole of these allegations might well have been made in one bill. There is no inconsistency in the Plaintiff stating the facts of her infirmity, that she was induced to execute this deed, then that finding it contained a power of revocation, and fearing that her advanced age might prevent her obtaining the relief of the Court in her lifetime, she executed the appointment, preferring not to wrest the deed from the Defendant by the strong arm of the Court, though she was perfectly entitled so to do.

Although the prayers of the two bills are founded on two alternatives, the result of the relief prayed is exactly the same in either case. This distinguishes the case from *Myddleton* v. *Lord Kenyon* (1).

It by no means follows, that a bill which impeaches a transaction upon various grounds, including that of fraud, must fail if the charge of fraud fails. It is only where the proof of fraud is the object of the suit, and all the other questions depend upon the question of fraud or no fraud. This distinction is clearly stated by Lord *Cottenham* in *Archbold* v. *Commissioners of Charitable Donations for Ireland* (2).

This is not strictly a supplemental bill. The prayer is that "so far as necessary or proper" it may be treated as a supplemental bill. It is an original bill in the nature of a supplemental bill.

It would be a great hardship if the Plaintiff should be compelled to dismiss her original bill.

The former bill prayed for the delivery up of other documents beside this deed.

Mr. *Kay* in reply :—

If the Plaintiff could neither amend, nor file a supplemental bill, she should have dismissed her former bill.

(1) 2 Ves. 391. (2) 2 H. L. C. 440, 459.

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SIR G. M. GIFFARD, V.C.:—

I certainly should not be disposed to allow this demurrer unless I found myself completely bound by the technical rules of the Court so to do; because I am satisfied that if these causes were both brought to the hearing I could do complete justice between the parties.

Now, do the technical rules of the Court bind me to allow the demurrer? First of all, it was said that the demurrer ought to be allowed because this new matter ought, in conformity with the new practice, to have been introduced by way of amendment, and not by supplemental bill. There are two answers to that; the first is, that it is not imperative to do so; a Plaintiff *may* introduce into the original record matters in respect of which he might before have filed a supplemental bill; and therefore the result is simply this, that if a party puts into a supplemental bill that which under the old practice was properly the subject of such a bill, it will simply be a matter for the consideration of the Court, whether the Plaintiff shall pay the costs of having filed a supplemental bill when he might, under the new practice, have introduced the matter by way of amendment. Another answer is, that this is a new and a distinct title, arising subsequent to the date of the filing of the original bill, and it is at least questionable whether this new title could be introduced by way of amendment.

A further ground was alleged in support of the demurrer, which was—that enough appears on the face of the bill to shew that the Plaintiff is not of competent ability, and that she cannot maintain a suit of this description. The contrary appears on the face of the bill, because the bill alleges that she has executed a valid deed of revocation.

Then we come to what is relied on as the substantial ground of the demurrer, namely—that there are two inconsistent statements, and, as it is said, two inconsistent descriptions of relief asked, and in support of that ground three cases have been quoted and relied upon.

The first is the case of *Myddleton* v. *Lord Kenyon* (1), which was this:—A bill was filed against trustees alleging fraud. In the alternative an account was asked for, and at the hearing of the cause the Court thought it would not be doing justice unless it dismissed the whole of the bill.

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(1) 2 Ves. 391.

The next case is that of *Kendall* v. *Beckett* (1). That was a case before Lord *Brougham*, in which His Lordship would not sustain a bill praying for a return of deposit, where the case of specific performance, for which the bill was mainly filed, was found to have failed.

The third case is *Rawlings* v. *Lambert* (2), which is different from this. That case turned materially on the uncertainty of the allegations in the bill; though to some extent also on the fact that the bill was filed by the Plaintiff in one point of view on behalf of himself and the other creditors of an intestate, and in another point of view by himself in his individual capacity as a partner. I think it turned mainly on the nature of the allegations in the bill.

The case we have here is this:—It is certain by both bills that in substance (and we must look to the substance of the thing, and not the mere words in which it is clothed) one and the same thing is sought, and that is this—to take away this property from the Defendant, and to declare that it is the property of the Plaintiff. Then the state of facts is this, that when the original bill was filed it was not known that there was in the deed a power of revocation and new appointment, and a bill was filed alleging, as far as one can gather from the statements in it, that from what we may term the connection arising from the relationship between the Plaintiff and the Defendant, and probably also from the Plaintiff's state of health, the Plaintiff was not competent to execute a deed of the description that was executed, and it was asked that that deed should be cancelled, and that the Defendant might pay the costs of the suit. After the institution of that suit the deed was seen, and it was ascertained that there was a power of revocation, and the Plaintiff was advised to execute that power. She did execute the power of revocation, and, having done so, she brings forward this case: "I have said by my former bill that that deed was not valid; but whether it was valid or not, here is a deed of revocation, and I am entitled to say that this property is mine, and that it is not yours." Where we have a case of this description, how inconvenient and hard would it be if a Plaintiff, having two grounds for saying that the property is hers, should be held not entitled to say, as against the same Defendant: "Here are two grounds; on either one or the other I am entitled to have this property." It would result in this: first of all, there would be one suit, and all the delay occasioned by that; there would be the trial of that suit; and then if that suit failed, there would be another and a different suit; but during the whole pendency of the first suit the Plaintiff would be deprived of the right of bringing forward another ground which might be just as well entertained at the hearing, and just as well form a ground for relief—a ground which the Plaintiff might not only be entitled to bring forward, but which she might insist upon without throwing any undue degree of hardship upon, or doing any injustice to, the Defendant. If there be anything at all in the circumstance of this case being brought forward in this way, it is this—that it does really put the Defendant in a better position than he would have been in if the second suit had not been brought forward at all.

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(1) 2 Russ. & My. 88.

(2) 1 J. & H. 458.

Therefore I am of opinion that there is nothing unjust in allowing a Plaintiff, in a case depending on two different states of circumstances, both resulting in the same relief, and having to do with the same question, to bring forward these two states of facts, and to bring them forward in this way. I am satisfied that both convenience and justice require that such a thing should be allowed; and I am further satisfied that there is nothing in the authorities that have been cited which precludes me from saying that such a thing may be done.

The demurrer therefore must be overruled. The question really is a question of the costs of the first suit. There will be a month allowed for answer from to-day if interrogatories have been filed; if not, six weeks from service of the interrogatories, with leave to file them.

Solicitor for the Plaintiff: Mr. *George Cart,* agent for Mr. *Edward Maurice Jones, Welchpool.*

Solicitor for the Defendant: Mr. *Henry Philipps.*

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Dec. 10, 11,
14, 15.

8 Eq 582-3,
10 Ch 66

Contempt of Court—Publication tending to influence Result of pending Suit—Publication by Solicitor.

While a suit was pending to restrain the infringement of a patent, in which one of the issues raised was as to the novelty of the Plaintiff's invention, a discussion having arisen in a newspaper as to the merits of the invention, the Defendants' solicitor wrote, under an assumed name, a letter, which was published in the newspaper, taking part in the discussion, and stating facts tending to disprove the novelty of the invention. The Plaintiff thereupon sent to the editor of the newspaper a letter, which the editor refused to insert on account of its personal imputations, in which he referred to the suit, and suggested that the writer of the letter was an interested party. The editor, not knowing that the writer was the solicitor in the suit, but knowing that he was a solicitor, subsequently published a further letter from him, disputing the novelty of the invention:—

Held, that the solicitor had been guilty of a contempt of Court in writing for publication letters tending to influence the result of the suit.

A motion to commit the publisher of the newspaper for contempt of Court in publishing the letters was refused without costs.

THESE were two motions on behalf of the Plaintiffs: the one, to commit Mr. *C. H. Collette*, one of the solicitors of the Defendants, for contempt of Court, in writing and procuring to be published in the *Volunteer Service Gazette* three letters relating to the subject matter of, and founded upon, the pleadings and evidence in the suit, with the view of diverting the course of justice and influencing the result of the suit; and the other, to commit the printer and publisher of the newspaper for contempt of Court in publishing the letters.

The suit was instituted in June, 1868, by Messrs. *Daw & Joyce*, against Messrs. *Eley*, to restrain the Defendants from infringing a patent granted on the 8th of March, 1867, to *Daw*, and now vested in both the Plaintiffs, for improvements in the construction of cartridges for breech-loading firearms. The Defendants, by their answer, denied the novelty and utility of *Daw's* invention, and, among other alleged anticipations of it, they relied on an invention of one *Rochatte*, of *Paris*, for which he had obtained a patent in *France* in October, 1866, and an English patent, of which the Defendants were the assignees, in July, 1867.

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In March, 1868, a prize of £400, offered by the Government for the best cartridge for breech-loading guns, was awarded to *Daw;* but the committee upon whose recommendation the prize was awarded reported that the *Boxer* cartridge then in use by the Government, which they considered to be disqualified to compete, was superior to the *Daw* cartridge in safety and accuracy of shooting.

On the 19th of September, 1868, a leading article was published in the *Volunteer Service Gazette* on the subject of the cartridge to be adopted for the new military rifle, which condemned both the *Boxer* and *Daw* cartridges as unsafe, but gave the preference in that respect to the *Daw* cartridge.

On the 26th of September, the first of *Collette's* letters, all of which were written under the assumed name of "*Copper Cap*," was published. It purported to be a reply to the article of the 19th, and contained the following passages:—

"The cartridge submitted by Mr. *Daw* to the committee was, as to its case, made of thin brass, folded on a mandril, having the edges (one overlapping the other) soldered. Metal cases, brazed, soldered, overlapping in coils, or drawn, had all been in public use before Mr. *Daw's* patent of March, 1867. A M. *Rochatte*, of *Paris*, in January, 1867, obtained provisional protection for a patent in *England* for the very same soldered case as submitted by Mr. *Daw* to the committee, except that M. *Rochatte* lined his case with paper. This patent, however, was allowed to lapse. It is a brass tube, soldered transversely up the side. The object of the lining is to protect the metal from the corrosive action of the powder. This is done in the *Boxer* by a coating of shellac. Now as to safety, the (so-called) *Daw* cartridge, when new, acts admirably. But let them be kept in store for any considerable time, and the powder will eat into the metal and render the discharge really dangerous in some breech-loaders, and I may name the Government *Snider* in particular. I have seen the experiment tried, and every single cartridge burst that was taken from a box that had been in stock several months, whereas only one burst of an equal number of cnrtridges just purchased of Mr. *Daw*, and which were fired from the same rifle. This disadvantage attends all metal cartridges which have no lining." . . . . "I wish it to be understood, that I do not desire to raise the question of *invention*, but of relative *safety* of the cartridges named."

On the 30th of September, *Daw* wrote and sent to the editor of the *Volunteer Service Gazette* a letter containing the following passages:—

"The communications from '*Copper Cap*,' in your paper of the 26th ult., may have been written by some rival cartridge manufacturer, some interested official, or it may be some unscrupulous lawyer or agent. It is certainly not likely to have been penned by any disinterested authority, as the subject shews a strong bias in a particular direction." . . . . "With respect to the alleged matter of M. *Rochatte's* pretended patent, that will be elucidated by the proceedings taken by me against Messrs. *Eley Brothers*, when the case comes for hearing, in November next, before the Master of the Rolls."

On the 3rd and 17th of October, letters were published in the *Volunteer Service Gazette*, signed "*Mowbray Walker*," advocating the superiority of the *Daw* over the *Boxer* cartridge, the latter of which contained the following passage:—

"I shall not argue the validity or priority of Mr. *Daw's* patent, which '*Copper Cap*,' with very questionable taste, has introduced. . . . Those interested in the matter will, I learn from the daily papers, be shortly gratified by an elaborate law suit between the rival manufacturers."

On the 15th of October, *Daw* called at the office of the *Volunteer Service Gazette*, and complained that his letter of the 30th of September had not been published; and, according to his own statement, he told the editor that law proceedings were pending, and that he had reason to believe that the letter of *Copper Cap* was written by an interested party. The editor refused to publish the letter either as a letter or as an advertisement, unless it was modified by omitting all personalities and imputation of motives. On the 17th of October, *Daw's* letter was published in the *Cosmopolitan* newspaper.

On the 24th of October, the *Volunteer Service Gazette* contained an editorial note, explaining the refusal of the editor to insert *Daw's* letter, on the ground above-mentioned, and referring to the publication of *Mowbray Walker's* letters as evidence that he was not prejudiced against *Daw's* cartridge.

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In the same number of the newspaper appeared *Collette's* second letter, which was a reply to *Mowbray Walker's* letters, and contained the following passages:—"In January, 1867, however, a *M. Rochatte* (a Frenchman) obtained provisional protection for a metal-case cartridge lined with paper, with the overlapping joining closed with solder. Early in February, 1867, *M. Rochatte* shewed, and left with Mr. *Daw*, samples of his metal soldered cartridges (see his letter in *Army and Navy Gazette,* April 25 last, p. 263). In March, 1867, Mr. *Daw* applied for a patent for a metal cartridge-case, with the overlapping edges soldered in exactly the same manner as *Rochatte's*, but without the paper lining; and he used the *Schneider* base and anvil. . . . So that Mr. *Daw* appears to have sent in for competition a cartridge of which the base was entirely *Schneider's*, the brass soldered case *Rochatte's*, the projectile and method of fixing it Colonel *Boxer's*, and, being the only competitor besides Colonel *Boxer*, he took the £400 prize."

The letter of *M. Rochatte* in the *Army and Navy Gazette* had been written upon the occasion of the Government prize to *Daw*, claiming for *Rochatte* the merit of the invention, and stating in detail the matters repeated on its authority in the letter of *Copper Cap.*

On the 31st of October, the *Volunteer Service Gazette* contained another letter from *Mowbray Walker*, answering the second letter of *Copper Cap* at great length and with much warmth, and a short letter from *Copper Cap* correcting an inaccuracy in his letter of the 24th, and on the same day the *Cosmopolitan* contained the following letter from *Daw*:—"I see that on Saturday last *Copper Cap* has added another prejudicial attack upon my cartridges in the *Volunteer Service Gazette,* the journal in which I have been refused the *entrée* for such letters as I deem it essential to write in defence of my interests. I deny *in toto* his adverse statements; but I am not disposed at this time, when important law proceedings have been instituted by me, to open any lengthy arguments in a public newspaper, for the possible advantage of men who may not scruple as to the use they may make of them." And also a letter signed "*X X X,*" headed "Who is *Copper Cap*, and what does he want?" violently attacking *Copper Cap* and the editor of the *Volunteer Service Gazette,* and containing the following passages:—

"Whether I may or not be a coming witness at the coming trial remains to be seen." . . .

"*Copper Cap* knows very well the dates of Colonel *Boxer's* patents, and, as one may, I think, glean from his words, the particulars of the *Daw-Eley* law suits; what can be more damaging to any belief in the integrity of his purpose, than the perfect acquaintance he has with the details of the *Eley* side pleas of the action now pending in the Rolls Court, brought by Mr. *Daw* against that firm for infringing, under the pretence or cover of *Rochatte's* so-called patent, that second and best invention by Mr. *Daw* himself, to which the breech-loading small arm sub-committee gave the £400 prize?

"I really hope *Copper Cap* will at least come forward and assure the world *in propriâ personâ* that he is not a lawyer engaged on any cartridge litigation now in progression."

On the 7th of November, the *Volunteer Service Gazette* contained another letter from *Copper Cap* in answer to *Mowbray Walker*, which did not allude to the subject of the Plaintiff's patent; and on the same day the *Cosmopolitan* contained a letter from *Mowbray Walker*, charging *Collette* with being the writer of the letters of *Copper Cap*, and a letter from *X X X* containing the following passages:—

"It is easy enough to perceive what his objects are, for, reading on, we find *Copper Cap* immediately proceeding with the legal quibble, evidently relied upon as the main ground of the defence in the approaching law suit of *Daw* v. *Eley*, in respect to the exceedingly questionable patent of Monsieur *Rochatte*, and drawing this conclusion—that Mr. *Daw* could not at the date of the article referred to have had any idea of any other than his paper-cased cartridge." . . . "'M. *Rochatte* obtained provisional protection in January, 1867.' Certainly he did, and let it go again, for he never completed his specification. 'Early in February, M. *Rochatte* shewed Mr. *Daw* some samples,' &c. How very good of him! He does not perhaps recollect Mr. *Daw* telling him that he had himself something better than his? 'In March, 1867, Mr. *Daw* applied for a patent.' Of course he did, and got it too. And on the 25th of July so did M. *Rochatte*, and this is the very questionable *Rochatte* patent for making 'mixed cartridge cases with interiors of paper pasteboard cloth, and exteriors of brass, iron, steel, zinc, or other metal or alloy, and leaving out in the making all but the brass and the tin.' "

On the 12th of November, the Plaintiffs ascertained from *Collette* himself, and also from the printer and publisher of the *Volunteer Service Gazette*, that *Collette* was the writer of the letters signed "*Copper Cap*," and they thereupon required the publisher to insert an apology for having published the letters; this he declined to do, but on the 14th he published the following editorial note:—

"It has been stated to us that the letters of *Copper Cap*, which have recently appeared in our columns, contain matters based upon the pleadings in the suit of *Daw* v. *Eley and Others*, now pending in the Court of the Master of the Rolls. This is alleged by one side and denied by the other, and we are not aware how the facts really stand. Under any circumstances, however, had we known that the writer signing himself '*Copper Cap*' was in any way connected with a suit pending on the subject, we should not have given insertion to his letters."

On the 16th of November, the Plaintiffs gave *Collette* and the printer and publisher notice of the present motions.

Collette, in his affidavit, stated that the letters were not written with a view of influencing the result of the cause; that he was a volunteer, and had taken a great interest in rifles and ammunition, and had considerable practical knowledge of and had taken part in public discussion of the subject of rifles and cartridges, and that it was "in that feeling and capacity alone" that he wrote the letters; that he believed that the letters of *X X X* and *Mowbray Walker* were published with *Daw's* knowledge and consent, and that the editor of the *Cosmopolitan* had refused to tell him the name of the writer of the letters signed *X X X*. *Daw* denied that these letters were written or published with his knowledge and consent, except that he had seen one of the letters of *X X X* before it was published, and that *Mowbray Walker* had told him the substance of his letters before they were published.

The editor of the *Volunteer Service Gazette* made an affidavit, stating that he was responsible for the conduct of the paper; that he did not know, when the letters were inserted, that the writer was in any way connected with any pending suit; that he did not know of the existence or subject matter of this suit, and that he had refused to insert *Daw's* letter solely on account of the imputations of motives which it contained.

Mr. *Jessel*, Q.C., and Mr. *Russell Roberts*, for the Plaintiffs, in support of the motion against *Collette*:—

Any publication tending to influence the result of a pending suit is a contempt of Court: *Tichborne* v. *Mostyn* (1); *General*

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(1) 1867, July 18. V.-C. *Wood.*
2 H&M 233. 14 WR 1072

Tichborne *v.* Mostyn.
Tichborne *v.* Tichborne.

Injunction—Publication of Affidavits with Comments pending Proceedings—Costs.

Eq 582
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Motion on behalf of the Plaintiff, that the publisher and printer of the *Pall Mall Gazette* should shew cause why they should not be committed for contempt of Court in publishing an abstract of the affidavits filed on behalf of the Plaintiff (but not as yet before the Court), with comments calculated to prejudice the Plaintiff's case.

The Plaintiff claimed to be Sir *R. C. D. Tichborne*, the eldest son of the late Sir *James Francis Tichborne*, and filed his bill on the 27th of June, 1867, to assert that position and recover his alleged rights, after an absence of fourteen years from this country; his story being that he had been shipwrecked on a voyage from *Rio* to *New York*, picked up at sea, and landed in *Australia*, where he had resided under an assumed name, without communicating with his family or any person in *England*, from 1854 to 1866.

Notice of motion for an injunction and receiver was served immediately after filing the bill; but on the 4th of July the motion was ordered to stand over, to enable the Defendants to answer the affidavits filed on behalf of Plaintiff.

On the 13th of July, 1867, appeared an article in the *Pall Mall Gazette*, headed "*Tichborne* v. *Tichborne*," and commencing thus:—"We have been favoured with a perusal of the affidavits put in on the Plaintiff's behalf in this extraordinary case." The article gave a short abstract of the story told by the Plaintiff, and attention was called to his conduct after landing in *England*, and to the affidavit of Lady *Titchborne* (widow of Sir *James Francis*), who had at once recognised the Plaintiff as her son. The article then proceeded:—

"We have not space to enter into detail as to the statements of the thirty-four persons whose affidavits follow those of the claimant and Lady *Tichborne*. Many of them are important enough if the deponents can endure cross-examination in the witness-box; many are obviously false, absurd, and worthless, being those of persons who, never having seen the claimant before he left *England*, are nevertheless convinced that he is the person he claims to be."

The article, after mentioning the evidence of Major *Heywood*, late of the *Carabineers*, and of two or three persons formerly non-commissioned officers and privates in that regiment, all of whom stated their conviction that the claimant was identical with Cornet *Tichborne*, formerly of the *Carabineers*, proceeded:—"No single member of either the *Tichborne* or *Seymour* families, nor any of the numerous officers

Exchange Bank v. *Horner* (before the Master of the Rolls, November 12th, 1868)(1) *à fortiori* is it so when the writer is the solicitor in the suit, and when he writes under an assumed name,

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with whom he served in the *Carabineers*, with the single exception of Major *Heywood*, have made any affidavit of their belief in the Plaintiff's identity."

The article, after pointing out various sources of identification open to the Plaintiff, concluded thus:—"We happen to know, as a fact, that Mr. *D. Seymour*, M.P., the claimant's uncle, Mr. *M'Evoy*, M.P., and Major *Phillips*, formerly of the *Carabineers*, his brother officers, his aunt, Mrs. *Nagle*, and his cousins, Mrs. *John Townley* and Mrs. *Radcliffe*, have had interviews with him; but as we do not find any affidavits from them in corroboration of his identity among the documents included in the volume now before us, we presume that they failed to recognise in the claimant their long lost relative."

The solicitor of the Plaintiff had filed an affidavit stating his belief that the article was likely to create a prejudice against Plaintiff, and to prevent witnesses from making affidavits, and otherwise seriously to impede the course of justice prior to the hearing of the cause.

Mr. *Giffard*, Q.C., Mr. *Druce*, Q.C., and Mr. *Locock Webb*, in support of the motion, cited *The Case of the Printer of the Champion* (2 Atk. 469), *S.C. nom. Roach* v. *Garvan* (2 Dick. 794); *Ex parte Jones* (13 Ves. 237); *Littler* v. *Thomson* (2 Beav. 129); *Felkin* v. *Lord Herbert* (33 L. J. (Ch.) 294); *Coleman* v. *West Hartlepool Railway Company* (8 W. R. 734).

Sir *Roundell Palmer*, Q.C., and Mr. *Speed*, for the publisher of the *Pall Mall Gazette*.

SIR W. PAGE WOOD, V.C.:—

I have no hesitation in saying that a gross contempt of Court has been committed in this case. From the time of Lord *Hardwicke* this Court has acted upon the rule which was laid down by that eminent Judge in the case against the printers of the *St. James's Evening Post* and *Champion* newspaper in these words:—"Nothing is more incumbent upon Courts of Justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard. It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced." That such an attempt has been here made, and made in a most offensive manner, I have not the slightest doubt. The author of the article in question has pronounced his opinion upon the documents before him with a clear and decided bias, and with all that boldness in which persons under the screen of the anonymous, and with no responsibility cast upon them, think themselves entitled to indulge. But those who have responsibility cast upon them, this Court and every tribunal which has to administer justice, are bound to protect every suitor from such an attempt to pervert the course of justice, and against that which can affect the minds of persons who might be willing to give evidence in the case, and may prevent them from coming forward when they find that they will expose themselves to criticisms of this description, obviously

(1) S.C. 3 W.N. 259.

so that those who read his publication may suppose that he is a disinterested person? The letters in question deny the novelty and utility of the Plaintiffs' invention on the very grounds which

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coming from a quarter having a considerable bias. The article in question is obviously the work of a gentleman of education and information, and, adopting the words of Lord *Langdale* in *Littler* v. *Thomson* (2 Beav. 129), I am surprised that a gentleman of education and science should think that he was serving the cause of truth and justice by taking a set of documents which have not even been submitted to the Judge who has to try the cause, and publishing articles containing comments upon them of this description. This is the first intimation I have had of the evidence, not a word of which has been submitted to the Judge. The *animus* of the commentary may be gathered from the concluding paragraph, in which, after commenting upon the evidence, and stating that it is the only evidence which Plaintiff has brought forward, the writer says, "we happen to know as a fact," &c. &c. Of course he must have been in communication with some of those parties who might, from not having made affidavits, be presumed not to be favourable to the Plaintiff's case; and some clue to the source from which this article emanated is thus afforded. It was suggested that the Plaintiff has not made an affidavit stating that he did not furnish the print of the affidavits to the author of this commentary. But *Qui s'excuse s'accuse.* Why should the Plaintiff have defended himself against any such charge, which was not even suggested by any affidavit on the other side? He is not obliged to excuse himself beforehand from all the possible motives which may be imputed to him in the course of a cause. It was said, however, that these comments are fair comments, unbiassed comments, and, further, that they do not err against those rules which have been laid down as to fair comment on matters of public notoriety. In the first place, however, those rules do not extend to comments on matters still pending, waiting for argument, and waiting for decision; and I think this Court would be failing extremely in the administration of justice if it allowed comments of such a description as are here contained to be made on any documents whatever which are before the writer and not before the Court, and which are afterwards to come before the Court — comments which have a clear and distinct tendency towards directing and swaying the mind of the Court or jury by whom the cause is to be determined. The article is unquestionably a very able argument addressed to the public in opposition to the view put forward by the Plaintiff. Every turn of the case is, with great ingenuity, presented in the most unfavourable way to the Plaintiff. The bias is most obvious, and the observations pass the bounds of any legitimate comment, even if comment could legitimately be made upon proceedings pending, but not yet actually before the Court. Not only is the bias of the writer's mind otherwise indicated, but the observation is made that many of the claimant's witnesses would be important if they could bear cross-examination in the witness-box, and that many of their statements are obviously false, absurd, and worthless. It appears to me plain and manifest that there has been a most improper

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are put forward by the Defendants in the suit, viz., as to its novelty—the prior publication of *Rochatte's* invention, and as to its utility—the absence of the paper lining. The effect of these letters could not but be to prejudice the mind not only of the public, but of those who may have as jurors to decide the questions in the suit, and the Court will not allow such statements to be published under the cover of a discussion of the general subject of the cartridges to be adopted by the Government. [They also referred to *Lechmere Charlton's Case* (1).]

Mr. *Southgate*, Q.C., and Mr. *Langley*, for *Collette*:—

The letters were not written with a view to influence the result of the suit; they do not contain any allusion to the suit, nor any statements based upon the pleadings or evidence. The statements as to *Rochatte's* patent are taken from his letter published in the *Army and Navy Gazette* long before the institution of the suit, and that letter is referred to as the authority. The question, whether the Plaintiffs' cartridges ought to be adopted for the use of the army was a perfectly fair subject for public discussion, and the fact that *Collette* was the solicitor in this suit ought not to prevent him from taking part in that discussion, which he did not begin, and in which

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attempt to interfere with the administration of justice.

In the course of the morning, while the motions against the other papers in which the article from the *Pall Mall Gazette* had been republished were proceeding,

Sir *Roundell Palmer*, Q.C., stated that as soon as the proprietor of the *Pall Mall Gazette* had been informed of His Honour's opinion he at once desired to make his humble submission and apology to the Court.

The VICE-CHANCELLOR said that after this submission it would be quite sufficient to order the *Pall Mall Gazette* to pay the costs of the motion.

With respect to the *Times* and *Morning Advertiser*, who had republished the article with acknowledgment and without any comment, no costs on either side.

With respect to the *Morning Post*, which had published an article with extracts from the affidavits, and a statement as to certain evidence very damaging to Plaintiff which would be brought forward by Defendants, the printer must pay the costs of the motion.

Mr. *Roxburgh*, Q.C., and Mr. *A. G. Martin*, for the *Times* and *Morning Advertiser*.

Mr. *Kay*, Q.C., for the *Morning Post*.

Solicitors: Mr. *John Holmes*; Mr. *Henry Child*; Mr. *R. H. Peacock*.

(1) 2 My. & Cr. 316.

the friends of the Plaintiffs joined. Moreover, in his letter he carefully disavowed any intention of discussing the question of invention. In *Tichborne* v. *Mostyn* the contempt of Court consisted in publishing and commenting on the affidavits in the suit, with a view to disparage the evidence on one side, and in *General Exchange Bank* v. *Horner* the bill and depositions were published and commented on. But in this case the only persons who in their published letters have alluded to the pending suit are the Plaintiffs and their friends, *Mowbray Walker* and *X X X*, whose letters were either seen by or communicated to them before publication. In those letters the only questions at issue in the suit are distinctly raised, and the Plaintiffs cannot after their publication be heard to complain of the letters of *Collette*. [They also referred to *Coleman* v. *West Hartlepool Railway Company* (1).]

LORD ROMILLY, M.R.:—

I will read the letters before I dispose of the matter finally; but, as it strikes me at present, I think the conduct of Mr. *Collette* cannot be defended. The principle is quite established in all these cases, that no person must do anything with a view to pervert the sources of justice or the proper flow of justice; in fact they ought not to make any publications, or to write anything, which would induce the Court, or which might possibly induce the Court, or the jury, the tribunal that will have to try the matter, to come to any conclusion other than that which is to be derived from the evidence in the cause between the parties; and certainly they ought not to prejudice the minds of the public beforehand by mentioning circumstances relating to the case. Now, if that is done with the intention of perverting the ends of justice there is no question that the Court would stop it, and very often the Court will judge for itself what are the fair inferences to be derived from the publications which appear; but it must also go beyond this; it must stop the publication where the evident result would be to affect the administration of justice, though that might not have been the intention of the person who did it. In this case the main question to be tried is the novelty of the Plaintiff's

(1) 8 W. R. 734.

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invention; in that state of things was Mr. *Collette* justified in writing his letter of the 26th of September, which is the first letter on the subject? There was, it is true, a leading article before that upon the subject of the patent, but the leading article does not say a word as to the priority of any invention; it does not say anything with respect to the validity of Mr. *Daw's* patent, whether, in fact, he had been forestalled by any one before him; it does not mention anything relating to it; but Mr. *Collette's* letter treats of nothing else, as it appears to me, with the exception of this passage at the beginning, "The writer of the article in your last issue under the heading 'The Cartridge of the New Military Rifle,' can have scarcely given the subject a practical consideration, when he places the *Daw* cartridge in comparison with the present *Boxer* service cartridge, particularly when he says that the *Daw* cartridge approaches the first essential more nearly than the *Boxer*" (the first essential being safety). If it had stopped there (and I am not now considering the position Mr. *Collette* filled), and it had been nothing more than this, or an enlargement upon it, it might have been said that it was a fair discussion of a public question of the merits between two particular patents, in which case this Court would not have interfered; but he says this, "The cartridge submitted by Mr. *Daw* to the committee was" so and so; "metal cases brazed, soldered, overlapping in coils or drawn, had all been in public use before Mr. *Daw's* patent of March, 1867." What has that to do with the comparative merits of the two? "A M. *Rochatte*, of *Paris*, in January, 1867, obtained provisional protection," &c., he refers to that, and then he states various disadvantages which there were in it, and he goes on to state various other things to shew that *Daw's* patent cannot be original; and the writer of the letter seems to feel that very strongly, for at the end of it he makes this observation, "I wish it to be understood that I do not raise the question of invention, but of relative safety of the cartridges named; those who have studied the question must admit that the present *Boxer* service cartridge is by far the best." Can anybody doubt that if I were persuaded that the whole of the statements in that letter were true, it would very seriously affect my opinion as to the validity and the originality of Mr. *Daw's* patent?

Then it is to be observed that this is written, not by a mere stranger, who might say that he really knew nothing at all about the cause, but it is written by the solicitor of the gentleman who is opposed to Mr. *Daw* in this suit. Surely that is a very strong feature in the case; he must wish that his client should succeed; and I venture to say that there is no solicitor who would not in the same position feel the same thing; and it is impossible that a solicitor can safely act in a matter of this description in writing an article in a paper which, if believed, must have a beneficial effect upon his client, and afterwards say "I had no intention of that sort at all, however much I may wish for it." It must be regarded as an endeavour to interfere with the due administration of justice. Where is the line to be drawn? It is highly important that the Court should not allow steps of this sort to be taken by the officers of the Court in causes in which they are engaged, which possibly may have an effect favourable to their client, or unfavourable to the other side; and I may further say, that if I am to go minutely into every sentence of a letter which is written in a public newspaper, to say this is questionable, and that is doubtful, and the like, it is imposing a task and a duty upon the Court which it will be impossible to perform. There is one distinct line drawn, which is this, that gentlemen who are concerned for contending clients in this Court, whether solicitors or counsel, should abstain entirely from discussing the merits of those questions in public print; if they do it at all, they ought to put their names to their communications; but to let the public suppose that it is merely done by a person who takes a great interest in, and has great knowledge of the subject, and discusses it from a public point of view, when, if the fact were known, he is the solicitor of the Defendant, and has the strongest possible interest in his success, is, in my opinion, highly reprehensible.

The other point, upon which I wish to read these papers, is this; unquestionably if a person submits to have the matter discussed in the public papers, and enters into the arena of public discussion, he cannot afterwards complain that this has been done; the Court will say to him, "as you have thought fit to discuss it there, you have accepted another tribunal." I want to look at the affidavits and papers, to see how far Mr. *Daw* really has accepted that tri-

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bunal, and transferred the discussion to it, and for that purpose I should like to know how soon Mr. *Daw* was aware that Mr. *Collette* had been the author of these letters. I was told that it was not until November.

[Mr. *Jessel.* The 12th of November.]

I should like to look through the papers before I finally dispose of the case, but it must be entirely understood that there must be no more publications on either side relating to this suit or affecting the validity of this patent.

Mr. *Jessel*, Q.C., and Mr. *Russell Roberts*, for the Plaintiffs, in support of the motion against the publisher:—

After the publication of *Collette's* first letter, *Daw* wrote to the editor a letter, which he refused to publish, informing him that the matter of *Rochatte's* patent was the subject of a pending suit, and also told him that he had reason to suspect that *Copper Cap* was an interested party. This ought to have induced the editor to inquire, and he must be taken to have published the other two letters with notice that the writer was the solicitor in the suit, and thereby to have committed a contempt of Court.

Mr. *Southgate*, Q.C., and Mr. *W. Karslake*, for the publisher:—

There was nothing in *Daw's* letter or statements to shew that the letters had any reference to the suit, or that the writer was in any way connected with it. It was not until after the last letter was published, that the editor ascertained that *Collette* was the solicitor in the suit. If the Plaintiff when he wrote his letter, which the editor was quite justified in refusing to publish, had asked for the name of the writer of *Copper Cap's* letter, and then told the editor that he was the solicitor, the other letters would not have been published.

Lord Romilly, M.R.:—

The case of the editor of a newspaper is very different from that of persons who write letters to the paper for publication. His duty is simply to take no part in matters purely personal between individuals, or in matters which are the subject of a lawsuit. But it often happens that private matters are so mixed up with public matters into which it is his duty to enter, that it is very difficult to draw the distinction between them. In this case, if the editor had inserted Mr. *Daw's* letter I should have thought that there was nothing in his conduct calling for the interference of the Court, but he did not insert it, and afterwards, with notice that a suit was pending, with the knowledge that the author of the letters was Mr. *Collette,* and that Mr. *Collette* was a solicitor, which ought to have induced him to inquire further and ascertain the exact position which Mr. *Collette* occupied, he allowed further letters on both sides to be published. I am inclined to think by what the Plaintiff told him he was put upon inquiry whether *Copper Cap* was connected with the suit. But I will read the evidence and dispose of both motions on Monday.

Dec. 14. LORD ROMILLY, M.R.:—

I have little to add to what I stated on Friday, when I explained the reason which induced me to take the course which I now intend to take. The perusal of the articles confirms me in the view I have taken, and it must be admitted by everybody to be an extremely improper thing for a solicitor in the cause to write an article in a paper which may either directly or indirectly influence the suit upon which he is engaged. I do not believe it was done with any improper motive, but it was done with great want of judgment. My opinion from reading these papers, and the comments and remarks in the anonymous publication in the *Volunteer Service Gazette* is, that the letters have that direct effect of influencing the suit, and therefore I am obliged to make the order that I have been obliged to make on a former occasion, and which was made by the present Lord Chancellor in the *Tichborne Case.* It appears to me, to say the least of it, to be a serious error of judgment on the part of Mr. *Collette,* and it is necessary that the Court should interfere.

As regards the case of the editor, I think that he did not shew quite the forbearance towards Mr. *Daw,* that he might have done, considering how materially interested Mr. *Daw* was in the matter,

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and that he might have made some little excuse for the warmth which Mr. *Daw* shewed upon the subject. At the same time there is nothing I can find against the editor for which I can require him either to make an apology, or to pay the costs of this motion; but, for the reasons I stated on the last occasion, I cannot give him costs, that is out of the question. He has certainly shewn a tendency to decide against Mr. *Daw*, but I also feel for the difficult position in which an editor is placed in such cases: but, as I said before, with respect to him I can make no order. With regard to Mr. *Collette* the order will be that Mr. *Collette* stands committed for contempt of this Court, and I desire that the parties will understand that it is my desire that the order shall not be enforced for a fortnight, to enable Mr. *Collette* to have the opinion of a superior tribunal, if he be so advised, or in case he should desire to make an apology for the error which he has committed; then he would pay the costs of the motion; and for that reason I desire that this order may not be enforced for a fortnight. I am obliged to say a fortnight, I would have given a longer time, but that you have not got longer time before Christmas. I have no doubt the Court of Appeal will hear him if necessary.

Solicitor for the Plaintiffs: Mr. *H. Harper Geach.*

Solicitors for the Respondents: Messrs. *Prichard & Collette;* Messrs. *Warry, Robins, & Burges.*

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FRASER *v.* WITT.

Stoppage in Transitu—Cargo shipped for Account and Risk of Consignee—Arrival of Ship at Port of Call for Orders—Constructive Delivery.

A., a merchant at *Bahia*, shipped at *Bahia* a cargo of sugar by the order and at the risk of *B.*, of *Glasgow*, in a ship chartered by *A.* The charter-party provided, that the ship should proceed "either direct or *viâ Falmouth, Cowes,* or *Queenstown*, for orders to a port in the *United Kingdom*, or to a port on the continent (between certain limits), and deliver the cargo in conformity with the bill of lading." The bill of lading stated that the ship was "bound for *Falmouth, Cowes,* or *Queenstown* for orders," and that the cargo was to be delivered "unto order or its assigns." *A.* sent to *B.* the charterparty, the bills of lading, indorsed to "*B.* or order," and the invoice, which stated that the cargo was shipped, "for the account and risk of *B.*, for *Falmouth*, *Cowes*, or *Queenstown* for orders and a market."

The ship arrived at *Falmouth*, and the master, in pursuance of written instructions from *A.*, announced its arrival to *A.'s* agents in *London*, and asked them for orders. The agents applied to *B.* for instructions as to the destination of the ship; but before any instructions were given *B.* became insolvent, and thereupon *A.'s* agents stopped the cargo:—

Held, that the cargo had not been constructively delivered to *B.*, that the *transitus* was not over, and that the stoppage was valid.

IN July, 1868, *J. T. Witt*, a commission merchant at *Bahia*, having received an order from a firm of sugar refiners at *Glasgow*, carrying on business under the name of the "*Alston Street Sugar Refining Company*," for a cargo of sugar at the limited price of 23*s.* per cwt., free on board at *Bahia*, and freight to the *United Kingdom* included, bought the sugar, and shipped it at *Bahia* in a vessel named the "*Rheidol Queen*," chartered by him. The charterparty provided, that the vessel should proceed "either direct or *viâ Falmouth*, *Cowes*, or *Queenstown*, for orders to a port in the United Kingdom of *Great Britain*, or to a port on the continent between *Havre* and *Hamburg*, both included, or to *Gothenburg*, or so near thereto as she may safely get, and deliver the cargo in conformity with the bills of lading on being paid freight" at the rates therein mentioned; that the cargo should be "shipped at the port of loading, and delivered at the port of discharge as customary;" that the freight should be "paid on unloading and right delivery of the cargo according to the custom of the port;" and that the vessel should be consigned to the charterer's agents at the port of discharge. The bill of lading was in these terms: "Shipped in good order and well conditioned by Messrs. *J. T. Witt & Co.* in and upon the good vessel called the '*Rheidol Queen*,' whereof is master for the present voyage *E. Hall*, and now loading at the port of *Bahia*, and bound for *Falmouth*, *Cowes*, or *Queenstown*, f/o" (so many cases of sugar), "and are to be delivered in the like good order and well conditioned at the port of discharge (all and every dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, excepted) unto order, or to its assigns, he or they paying freight for the said goods as per charterparty."

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On the 5th of August, 1868, a letter was delivered by *Witt* to the master of the vessel, requesting him to proceed to *Falmouth*, *Cowes*, or *Queenstown* for orders, and to telegraph there the arrival of the vessel to Messrs. *Ehlers & Sergel*, *Witt's* agents in *London*, who would instruct him as to the port of discharge. On the 10th of August, 1868, *Witt* wrote a letter to the company, advising them of the sailing of the vessel on the 5th of August for *Falmouth*, *Cowes*, or *Queenstown* for orders, in one of which ports she was to "await their orders within seven days." In this letter were enclosed the charterparty, the bill of lading, indorsed as follows: "Deliver to the *Alston Street Sugar Refining Company*, or order *p.p. J. T. Witt & Co.—Ad. Kleinschmidt;*" and the invoice of the sugar, which was headed as follows: "Invoice on 297 cases, 4 boxes, 39 barrels, and 573 bags of brown sugar shipped for account and risk of the *Alston Street Sugar Refining Company*, of *Glasgow*, in the British lugger *Rheidol Queen* (*E. Hall*, master), for *Falmouth*, *Cowes*, or *Queenstown*, for orders and a market."

The letter and its enclosures were received by the company in September, and at the same time the company accepted five bills of exchange, payable at ninety days' sight, drawn upon them by *Witt* for the price of the sugar, including freight and commission. On the 6th of October the vessel arrived at *Falmouth*, and on the same day the master telegraphed its arrival to *Ehlers & Sergel*, who, on the same day, telegraphed the arrival to the company, and wrote to the company to inquire what orders should be given as to the port to which the ship was to proceed. The company, on the 7th of October, 1868, replied by letter that they would advise *Ehlers & Sergel* of the destination of the ship before the expiration of the lay days, which would expire on the 14th. On the 12th of October the company stopped payment; on the 13th *Ehlers & Sergel* telegraphed to the master of the ship not to leave *Falmouth* without further instructions from them, and on the 15th they served him with a notice stopping the cargo on behalf of *Witt*. On the 16th of October the company sent orders by telegraph to the master to proceed immediately to *Glasgow*, but on the 17th he received orders from *Ehlers & Sergel* to proceed, and accordingly proceeded, to *Liverpool*. On the 17th the company assigned all their property to the Plaintiff for the benefit of their creditors, and on the 23rd the Plaintiff instituted this suit against *Witt* and the master of the ship for a declaration that he was entitled to the cargo, and for an injunction to restrain the Defendants from discharging it except at such place as he should direct, and from selling or disposing of it. The cause came on upon motion for an injunction which had been turned by consent into motion for decree.

Mr. *Jessel*, Q.C., and Mr. *North*, for the Plaintiffs:—

First: By the shipping of the sugar free on board for the account and at the risk of the company, and the indorsement and transmission to them of the bill of lading, *Witt* had so far parted with the possession of the goods as to deprive himself of the right to stop them *in transitu: Wilmshurst* v. *Bokwer* (1); *Van Casteel* v. *Booker* (2); *Key* v. *Cotesworth* (3); *Paley's* Principal and Agent (4).

Secondly: At all events when the vessel arrived at *Falmouth*, and notice was given to the company that it was awaiting their orders, the *transitus* and right of stoppage ceased. From that time the master of the ship held the goods as the agent of the company, and the delivery was complete: *Valpy* v. *Gibson* (5); *Rowe* v. *Pickford* (6); *Leeds* v. *Wright* (7); *Fowler* v. *Kymer*, cited by *Lawrence*, J., in *Bohtlingk* v. *Inglis* (8); *Dixon* v. *Baldwin* (9); and *Whitehead* v. *Anderson* (10). To use the words of Lord *Ellenborough* (11), "the goods had so far got to the end of their journey, that they waited for new orders from the purchaser to communicate to them another substantive destination." By the charterparty the goods were to be delivered in conformity with the bill of lading, and by the bill of lading, as indorsed, they were to be delivered to the company or order. The company had told the Defendant's agents that they would send orders, and the ship at *Falmouth* was, in the words of Lord *Wensleydale* in *James* v. *Griffin* (12), "only

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(1) 7 Man. & G. 882.
(2) 2 Ex. 691, 708; 18 L. J. (Ex.) 9.
(3) 7 Ex. 595; 22 L. J. (Ex.) 4.
(4) Page 352.
(5) 4 C. B. 837, 865.
(6) 8 Taunt. 83.
(7) 3 B. & P. 320.
(8) 3 East, 396.
(9) 5 Ibid. 175.
(10) 9 M. & W. 518, 535.
(11) 5 East, 186.
(12) 2 M. & W. 623, 633.

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the place where the company meant the goods to remain until a fresh destination was communicated by orders from them."

[They also referred to *Schotsmans* v. *Lancashire and Yorkshire Railway Company* (1).]

Mr. *Roxburgh*, Q.C., and Mr. *Eddis*, for the Defendant *Witt*:—

First: *Berndtson* v. *Strang* (2) is a clear authority to shew that the delivery of the goods free on board, even on a ship chartered by the purchaser, and the indorsement of the bill of lading to the purchaser, does not destroy the right of stoppage *in transitu*. The authorities cited for the Plaintiff do not support the contrary proposition. In *Wilmshurst* v. *Bowker* (3) there was no insolvency, and the question was whether the vendor could rescind the sale. In *Van Casteel* v. *Booker* (4) the goods were delivered on board the purchaser's own vessel, and were not to be delivered at any particular port, but to be sent on a roving voyage for a market. In *Key* v. *Cotesworth* (5) the goods had been actually delivered to and sold by the agents of the purchasers before a claim to stop them was made by the vendor.

Secondly: the *transitus* had not ended when the cargo was stopped. Even if *Falmouth* had been the port of discharge the *transitus* would not have been at an end while the goods remained on board the vessel: *Coventry* v. *Gladstone* (6). But by the terms of the charterparty and bill of lading, *Falmouth* was not the port of discharge, but only a port of call for orders, to be given by *Witt's* agents, as to the port of discharge, and until the vessel arrived at the port to be so indicated by the agents, the vessel and cargo remained subject to the control of the charterer. The ship at *Falmouth* was waiting the orders not of the company but of *Ehlers & Sergel*; and, in fact, the company did not send any orders until after the stoppage.

The original contract between *Witt* and the master of the ship had not ceased, and there was no new contract between the master of the ship and the company that the master should hold the cargo at their orders. By the charterparty and bill of lading the

12 Jur. N.S. 347 42

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(1) Law Rep. 1 Eq. 349; 2 Ch. 332.
(2) Ibid. 4 Eq. 481; 3 Ch. 588.
(3) 7 Man. & G. 882.
(4) 2 Ex. 691.
(5) 7 Ibid. 595.
(6) Law Rep. 6 Eq. 44.

payment of the freight was made a condition precedent to the delivery of the cargo.

[They also referred to *Gibson* v. *Carruthers* (1).]

Mr. *Rowcliffe*, for the master of the ship.

Mr. *North*, in reply:—

In *Berndtson* v. *Strang* (2) the bill of lading was indorsed in blank. To put an end to the *transitus* it is not necessary that the goods should arrive at the original destination; the consignee may take possession previously and so put an end to the *transitus*, and he need not actually take possession. It is enough if the goods are in the place where he means them to remain until he gives them a new destination: *James* v. *Griffin* (3). Here the intention of all parties was that the cargo on its arrival at *Falmouth* should be subject to the orders of the company, and it is immaterial whether those orders were to be given direct, or through *Ehlers & Sergel*. In *Coventry* v. *Gladstone* (4), the only question was, whether there had been an actual delivery of the cargo.

[He also referred to *Story* on Contracts (5).]

Nov. 25. Lord Romilly, M.R.:—

The question to be determined in this case is, whether the Defendant *Witt* has made a valid stoppage *in transitu* of a cargo of sugar sold by him to the *Alston Street Sugar Refining Company*, which became insolvent after the sale.

The doctrine of stoppage *in transitu* may be shortly expressed thus—it is the right which the seller of goods has, after they have been sold and despatched to the buyer, to stop them at any time before they have been delivered to the buyer, if the buyer has not paid for the goods and has, in the meantime, become insolvent. The real and, indeed, the only question in all these cases is, whether the *transitus* is over; in other words, whether the goods have been delivered to the buyer; if they have, then the right to stop is gone, and the only remedy of the seller is by action at law, or

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(1) 8 M. & W. 321.

(2) Law Rep. 4 Eq. 481; 3 Ch. 588.

(3) 2 M. & W. 623.

(4) Law Rep. 6 Eq. 44.

(5) § 822.

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by proof against the estate of the buyer. [His Lordship then stated the facts, and continued:—] The question is, whether this was a good stoppage *in transitu*, and I am of opinion that it was. It is argued strongly on behalf of the Plaintiff, that when the sugar was put on board at *Bahia*, on the account and at the risk of the company, the goods belonged to the company and had been thereby delivered to the company. It is no doubt true that the cargo was the property of the company, and that if the cargo had been lost the loss would have fallen on the company; but this does not determine the question. In these cases the goods are always the property of the purchaser: if they were not, the question would not arise, because of course the vendor, or any other person, may always take possession of his own property, but the doctrine of stoppage *in transitu* is, that a vendor may stop the goods which he has sold to, and which have become the property of, the purchaser, at any time before they have got into his possession, if he has become insolvent. The insolvency of the purchaser is essential; the vendor cannot stop the goods because he has changed his mind. This was the case in *Wilmshurst* v. *Bowker* (1), and consequently the right to stop did not arise. In order to constitute a right to stop *in transitu*, the purchaser must have become insolvent, and the *transitus* must not be over; here the insolvency is unquestioned, the only point to be examined is, whether the *transitus* was over, in other words, whether the goods had actually been delivered to the company. Lord *Wensleydale*, in the case of *James* v. *Griffin* (2), specifies four kinds of delivery, in the following passage, which was much relied on in the argument for the Plaintiffs. He says, "The actual delivery to the vendee or his agent, which puts an end to the *transitus* or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods, or at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself, or it may be by the vendee's taking possession by himself or agent at some point short of the original intended place of destination." Now, it is contended that the present is exactly the third case pointed out by that learned Judge; but, in truth, it is

(1) 7 Man. & G. 882.

(2) 2 M. & W. 633.

quite distinct from any of the cases put by him. It is obvious that there was no delivery to the vendee, or his agent; there was no delivery at the vendee's own warehouse, or at a place which he used as his own; the question is, whether there was delivery at a place where the vendee meant the goods to remain until a fresh destination was communicated to them by orders from himself. If the ship had, under the direction of the company, proceeded to the *Clyde*, still the *transitus* would not have been over; but if, on its arrival, the company had determined to send the cargo to another port, not within the original charterparty, and had for that purpose chartered the vessel afresh, and thereby made the master their own agent, then the constructive delivery pointed out by Lord *Wensleydale* would have occurred, and it would have been the same thing in substance as if the cargo had been taken from the vessel and put on board another vessel under the direction and control of the company. The purchaser must not only be the owner of the goods, but he must be the owner for the time being of the receptacle in which the goods are placed. This was not so in the present case; the company could not have sent the sugar to any port in the *Mediterranean*, or, indeed, to any port, except one within the limits specified in the charterparty effected by the Defendant at *Bahia*, and even if directions had been given by the company to proceed to one of the ports specified in the charterparty, still there would have been no delivery to the company until after the arrival of the cargo in that port, and some act done by which the possession and absolute control over the sugar had been vested in the company. But, in truth, not even this was done; for *Ehlers & Sergel* did not desire the company to give the master directions whither he was to go, or put him under their control, but they wrote to the company and said, "Give *us* instructions as to the port to which *we* are to send the vessel," and even then instructions never came until after the delivery of the goods had been stopped by *Ehlers & Sergel*, the agents of the Defendant.

So looking at this matter, all the reported decisions which have been cited to me are consistent with each other, and each points to the *transitus* as being the sole matter to be determined. But the case of *Berndtson* v. *Strang* (1) is, in my opinion, decisive of the present case, and, indeed, in many respects, involves the same principles. Here the vessel was not, as in that case, the vessel of the purchasers, but was chartered by the vendor; in other respects the material facts are the same in the two cases; the goods were in that case, as in the present, on board on the account of, and at the risk of the purchasers; but the Court determined that the *transitus* was not over, and that the stoppage was good. I am of opinion in this case that the *transitus* was not over, that the cargo had not been delivered to the company either actually or constructively, and that the stoppage by the Defendant's agents was good.

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(1) Law Rep. 3 Ch. 588.

A point was raised by the counsel for the Plaintiff to this effect, that the form of the charterparty coupled with the sending and delivery of the bill of lading, and with the notice to the company that the ship was at *Falmouth* awaiting their orders, made all subsequent stoppage impossible; but, in my opinion, these circumstances do not at all affect the case; they occur in all cases, and the delivery of the bill of lading to the purchaser, or his acceptance of the bills drawn upon him in respect of the cargo, does not prevent the seller from stopping the cargo before actual delivery, if the purchaser has become insolvent. The case, therefore, of the Plaintiffs entirely fails, and the bill must be dismissed with costs.

Solicitor for the Plaintiff: Mr. *Lydall*, agent for Messrs. *T. & T. Martin, Liverpool.*

Solicitor for the Defendants: Mr. *Crump.*

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Dec. 12.

In re METTE'S ESTATE.

Lands Clauses Act, ss. 70, 74—*Tenant for Life and Remainderman—Beneficial Lease.*

Post 823.
16 Ch. D. 600-1

By the will of a testator, who died in 1838, land was devised to a tenant for life with remainder over in fee. In 1859 the tenant for life and remainderman concurred in demising part of the property for twenty-one years at what was then a rack rent of £84. In 1868 the demised property was taken by the *Metropolitan Board of Works*, and the purchase-money (which when invested would yield £200 a year) was paid into Court under the provisions of the *Lands Clauses Act*:—

For former practice see 2 Sch. & Lef. 434 n. 1

Held, that the tenant for life was entitled only to £84 a year during the residue of the term, and that the surplus income during that time must be accumulated.

MR. *E. M. Mette*, who died in 1838, by his will devised certain real estate, including a freehold house, No. 57, *High Street, Kensington*, to trustees during the life of his wife, *Elizabeth Mette*, upon trust to pay the rents thereof to her during her life for her separate use, and after her decease he devised the same to his nephews, *Bernhard Mette* and *H. A. Mette*, as tenants in common in fee. *Bernhard Mette* died in 1856 intestate.

In 1859 the trustees for the time being of the will, *Elizabeth Mette, H. A. Mette*, and *Bernhard Mette* (the eldest son of *Bernhard Mette*, deceased), concurred in demising the house in question for a term of twenty-one years from Midsummer, 1859, at a yearly rent of £84. The house was at the time out of repair, and the rent reserved by the lease was the best that could then be obtained.

In 1868 the house was taken by the *Metropolitan Board of Works* under the powers of the *Kensington Improvement Act*, 1866, with which the *Lands Clauses Act* was incorporated; and the purchase-money, amounting to £4978, was paid into Court.

A Petition was now presented by *Elizabeth Mette* praying for the investment of the fund, and the payment to her of the dividends.

Mr. *Archibald Smith*, for the Petitioner:—

This is an ordinary Petition under sect. 70 of the *Lands Clauses Act*, but it is contended on behalf of the remainderman that the Petitioner is entitled only to £84 during the residue of the term, and that the surplus income over and above £84 must in the meantime be accumulated. This argument is founded on sect. 74 of the same Act; but that section applies only to college and ecclesiastical leases, granted at a low rent in consideration of a fine, whereas this is the ordinary case of freehold property leased at a rack rent. The whole policy of the Act is contrary to what is here contended for. The Act empowers the tenant for life to sell real estate; but if the contention I have mentioned be well founded, he would have little interest in securing the best price for the reversion, and therefore the conduct of the sale ought not to be entrusted to him. In ordinary settlements of real estate, where there is a power of sale,

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the purchase-money is directed to be re-invested in land, and in the meantime, until a suitable purchase can be found, to be invested in consols or some other security, and the dividends are directed to be paid to the person who would be tenant for life of the purchased real estate. Sects. 69 and 70 of the Act contain exactly similar provisions; and under these it is submitted that the Petitioner is entitled to the whole income, the 70th section providing expressly that "the interest, dividend, and annual proceeds" of the investments be "paid to the party who would for the time being have been entitled to the rents and profits of the land." Further, in this case the tenant for life and remainderman joined in a lease, which was granted, not for the benefit of the tenant for life, but of the whole estate. The tenant for life ought not to be deprived of her interest in the lease; she has a power of re-entry on breach of the covenants, and might possibly re-enter. On a sale under circumstances such as these, the value is always enhanced, and the tenant for life should participate in such enhanced value. In *In re Wootton's Estate* (1), Vice-Chancellor *Kindersley* decided that the tenant for life was only entitled to the yearly rent reserved by a lease; but in that case the lease was granted prior to the date of the will. This is opposed to a decision of the same Judge in *In re Steward's Estate* (2), which governs the present case.

Sir *R. Baggallay*, Q.C., and Mr. *Chitty*, for the persons entitled in remainder, were not called upon.

Mr. *Casson*, for the *Metropolitan Board of Works.*

LORD ROMILLY, M.R.:—

I think this question is concluded both by authority and on principle. As to the principle, the matter is really quite clear. Mr. *Smith* lays great stress on the circumstance that the lease was granted at a rack rent. But it is well known that in *London* and other large towns the value of property rises so rapidly that in a very few years a lease originally granted at a rack rent becomes a beneficial one; and that is what has happened here. Nor can any distinction be drawn between a lease granted in consideration of a premium at much less than the rack rent, and a lease originally granted at a rack rent which has become more valuable. The two leases are in exactly the same situation; for although at first the rent may represent the annual value of the property, yet ten years afterwards the rent payable may be below the value to the same extent as if the lease had been originally granted at a low rent in consideration of a premium. The two cases must therefore be treated in the same way.

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(1) Law Rep. 1 Eq. 589.

(2) 1 Drew. 636.

Now, it is said that the lease here was granted at a rack rent and for the benefit of the estate. That may be so; but the value of property in *Kensington* has increased so much that the lease has become valuable in the course of nine years. How am I to deal with such a case? I must ascertain the real value given for the property. What is that value? It consists of two parts: £84 a year for the residue of the term, and the reversion. Of these the £84 a year belongs to this lady; and if the purchase-money when invested will yield £200 a year, that purchase-money must have been paid on the assumption that the surplus of £200 a year over and above the £84 a year, when accumulated for the residue of the term, will, together with the original purchase-money, represent the value of the reversion. It is the 74th section of the *Lands Clauses Act* that deals with such a case. That section is not confined to ecclesiastical or college leases, but extends to all cases where the rent bears an inadequate proportion to the value of the land.

Then it is said that a fictitious value is created by the fact that the land is taken compulsorily, and it is argued that it is unjust that the whole of this should go to the remainderman. Morally speaking, that may be so, and the remainderman might very well be appealed to on this ground to allow something to the tenant for life; but on legal principles the value paid must be taken to be the true value of the property.

I think also that the authority of *In re Wootton's Estate* (1) settles the question. The other case, *In re Steward's Estate* (2), which appears to have been also decided by Sir *Richard Kindersley*, was different. The lease was granted in consideration of a covenant to lay out money on repairs and improvements; and

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(1) Law Rep. 1 Eq. 589.

(2) 1 Drew. 636.

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unless we saw the covenants it would be difficult to say that that was an authority which could govern this case.

I think, therefore, that the lady can take only £84 during the residue of the term; the rest of the income during that term must be accumulated and invested. At the end of the term she will be entitled to the income arising from these accumulations, as well as from the original purchase-money, and she may thus ultimately get some benefit from the increased value of the property.

Solicitors: Messrs. *Church, Sons, & Clarke;* Messrs. *G. F. Hudson, Matthews, & Co.;* the Solicitor to the *Metropolitan Board of Works.*

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1868
Nov. 21, 23.

In re UNITED SERVICE COMPANY.

Company—Winding-up—Voluntary Winding-up under Supervision superseded by Compulsory Winding-up.

17 Ch D 252
254.
25 Ch D. 128, 9
136, 140

Five months after the commencement of the voluntary winding up of a company two Petitions were presented, the one for the continuation of the voluntary winding-up under the supervision of the Court, the other for a compulsory winding-up; the Court being of opinion that the winding-up ought to be compulsory, but not desiring to alter the date of its commencement, made an order on the first Petition for the continuation of the voluntary winding-up under supervision, and an order dated on the following day on the second Petition for a compulsory winding-up.

THE *United Service Company, Limited,* was registered in June, 1865, under the *Companies Act,* 1862, with the object of carrying on banking, insurance, and agency business. It shortly afterwards commenced business at No. 9, *Waterloo Place, Pall Mall.*

On the 19th of June and the 6th of July, 1868, a resolution was passed and confirmed at extraordinary general meetings of the shareholders for the voluntary winding up of the company and the appointment of *Frederick Hamilton* to be liquidator.

On the 3rd of November, 1868, Messrs. *Morgan, Brothers,* who were the principal creditors of the company, and also the holders of 1000 shares, presented a Petition for the continuation of the voluntary winding-up under the supervision of the Court.

On the 12th of November Captain *Vaughan,* who kept a banking account with the company, on which about £400 was due to him, and who had deposited with the company for safe custody certain securities, and Captain *Evans*, who kept a banking account with the company, on which about £300 was due to him, presented a Petition, alleging that the liquidator had taken no steps for calling in the assets or discharging the liabilities of the company, and that the Petition of *Morgan, Brothers*, had been presented at the instance of the company and the liquidator, and with the view of retaining in their hands the control of the winding-up, and praying for a compulsory winding-up.

The liquidator deposed that the resolution for the voluntary winding-up was duly advertised in the *London Gazette* of the 7th of July, 1868, that at the request of all the shareholders residing in the *United Kingdom*, and of the principal creditors, he had allowed *Hudson*, the manager of the company, to carry on business at the company's office on his own account under the name of the *United Service Bank*, *Hudson* being in treaty with him for the purchase of the goodwill and entire assets of the company; that immediately after the passing of the resolution the name of the *United Service Bank* was substituted for the name of the company on the office in *Waterloo Place;* that circulars were sent to the customers inclosing a written authority to be signed by them, authorizing the transfer of their accounts from the company to *Hudson;* that a great number of the customers signed such authorities; and that *Hudson* at once paid the amounts due to such of the customers as declined to transfer their accounts.

Captain *Vaughan* and two other customers of the company deposed that they had received no notice of the resolution to wind up, and that they had continued their accounts in the belief that the company was carrying on its business, until the 31st of October, when the doors of the office were closed, and payment of their cheques was refused. No alteration had been made in their pass-books, and they had drawn cheques after the 6th of July on the forms given to them by the company.

Another customer made a similar affidavit, but the liquidator produced an authority signed by him for the transfer of his accounts. *Hudson* had absconded.

The two Petitions came on to be heard together.

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Mr. *Roxburgh,* Q.C., and Mr. *G. Hastings,* for the first Petitioners:—

Captains *Vaughan* and *Evans* must be taken to have had notice that the company was being wound up, and to have accepted *Hudson* as their creditor in the place of the company. They have, therefore, no *locus standi.* But assuming them to be creditors, their Petition was quite unnecessary, another Petition having been already presented. The interests of the creditors will be sufficiently protected by a winding-up under the supervision of the Court, and an order for compulsory winding-up will affect the validity of the proceedings under the voluntary winding-up.

Mr. *Jessel,* Q.C., and Mr. *Dauney,* for the company.

Mr. *Ellis,* and Mr. *Hull,* for the second Petitioners:—

The advertisement in the *Gazette* was no notice to creditors of the winding up of the company; but, in fact, the company carried on its business until the 31st of October, the transfer of the business to *Hudson* was never completed, and he was merely the agent of the company. The Petitioners are clearly creditors of the company, and, having regard to the dealings of the company and the liquidator, the Court will take the winding-up into its own hands. The presentation of the second Petition was necessary, both on account of the misconduct of the liquidator, which could not have been otherwise brought before the Court, *In re Imperial Bank of China, India, and Japan* (1), and also because the first Petition was really the Petition of the company, and in such cases the creditors are justified in presenting a separate Petition: *In re Humber Ironworks Company* (2).

Mr. *Roxburgh,* in reply.

Nov. 23. LORD ROMILLY, M.R.:—

This is one of those cases in which I think it is absolutely necessary to have the conduct of the directors inquired into. They entered into a transaction of which they may have given the formal notice required by the statute, but I am satisfied that there is no proof that the customers knew of it. There are two of them who certainly did not know of it; there is a third who says he did not know of it, who is clearly proved to have known of it; but how many more knew of it I have no evidence, nor do I know how many shareholders attended the meetings. The whole transaction with *Hudson* is very questionable. The pass-books contain no indication whatever of the change in the company; they are balanced up to a certain period, but that would not inform a customer that he was no longer dealing with the same person. This is a species of concealment, and is highly improper. I shall, therefore, do what I have done in other cases, where I have thought that the conduct of the directors required a close investigation; I shall make a compulsory order on both Petitions, and I shall give the carriage of it to the second Petitioners.

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(1) Law Rep. 1 Ch. 339. 12 Jur N.S. 423.

(2) Law Rep. 2 Eq. 15. 35 Beav 34 12 Jur N.S. 265

Mr. *Jessel* referred to the 152nd section of the *Companies Act*, 1862, and suggested that if an order were made for the continuation of the voluntary winding-up under the supervision of the Court, and an order dated the following day for a compulsory winding-up, which would supersede the previous order, the winding-up would commence from the passing of the resolution, and not from the date of the presentation of the Petition.

LORD ROMILLY:—

I think I may do that. The first order will be drawn up on the first Petition, and the second order dated to-morrow on the second Petition.

Solicitors for the First Petitioners and the Company: Messrs. *Deane & Chubb.*

Solicitors for the Second Petitioners: Messrs. *Gadsden & Treherne.*

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10 Eq 254

CORNECK *v.* WADMAN.

Will—Construction—Gift to A. for Life with Remainder to his Children, to be paid at Twenty-one, "with Benefit of Survivorship"—Period of Survivorship.

A testator gave a fund to trustees upon trust to pay the income to *A.* during his life, and after the decease of *A.* leaving issue, upon trust to pay, apply, assign, and transfer both principal and interest to and amongst all and every the child and children of *A.*, equally to be divided between them, and if but one, then to such only child, to be paid to them, if sons, at twenty-one, and if daughters at that age or marriage, "with benefit of survivorship;" and in case there should be no child or children of *A.* at the time of his death, or if all and every such child or children should die before attaining twenty-one or marriage, then over. *A.* had eight children, of whom three died infants in their father's lifetime, two attained twenty-one and died in his lifetime, and three attained twenty-one and survived him:—

Held, that the two children who attained twenty-one and died in their father's lifetime took vested interests, and that their representatives were entitled to share in the fund along with the children who survived their father.

M'Donald v. *Bryce* (1) and *Daniel* v. *Gosset* (2) questioned.

JAMES BRAZIER LA GRANGE, by his will, dated the 22nd of January, 1823, after making a certain specific bequest, gave all the residue of his property, of what nature or kind soever, to trustees upon trust to pay an annuity of £120 to the persons therein mentioned; and subject thereto, he desired his said trustees to pay the whole of the remaining income to his son, *James Warrington La Grange,* for his life. The testator then proceeded as follows:—"And from and after the decease of my said son leaving lawful issue, I do hereby declare that the whole of the residue and remainder of my said property, both principal and interest, shall be and continue with my said trustees, or the survivor of them, his or her executors, administrators, or assigns, upon trust to pay, apply, assign, and transfer the same to and amongst all and every the child and children of my said son lawfully begotten, equally to be divided between them, share and share alike, and if but one then to such only child, to be paid to them, if sons, at the age of twenty-one, and if daughters, at that age or marriage, *with*

(1) 16 Beav. 581.

(2) 19 Beav. 478.

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benefit of survivorship, the interest, however, in the meantime, after the decease of my said son, to be paid by my said trustees or the survivor of them for and towards the maintenance and education of such child or children until their respective shares shall become payable, in proportion to their respective shares: And in case there shall be no child or children of my said son lawfully begotten at the time of his decease, or if all and every such child or children shall die before attaining the age of twenty-one or marriage, then upon trust" for the persons therein mentioned.

The testator died in February, 1823, and shortly afterwards this suit was instituted for the administration of his estate. In pursuance of orders made in the suit, a sum of £1242 0*s.* 4*d.* Reduced Annuities had been carried over, and was now standing to the account of the residuary estate of the testator.

James Warrington La Grange, the testator's son, died in September, 1868, having had eight children, of whom three died infants in their father's lifetime; two attained twenty-one and died intestate in their father's lifetime, leaving him, therefore, their sole next of kin; and the remaining three attained twenty-one and survived their father.

A Petition was now presented by the three last-mentioned children for the sale of the £1242 0*s.* 4*d.* Reduced Annuities, and, after providing for costs, for the payment of the proceeds of sale to them.

Mr. *W. Pearson*, for the Petitioners:—

Only those children who survived their father can take. The word "survivorship" *primâ facie* refers to the period of distribution: *Cripps* v. *Wolcott* (1); and that rule of construction has been applied in cases very similar to the present: *Huffam* v. *Hubbard* (2); *M'Donald* v. *Bryce* (3).

[Lord Romilly, M.R.:—I very much doubt the correctness of my decision in *M'Donald* v. *Bryce*, and I think that case ought not to be cited as an authority before me.]

Mr. *W. Pearson*:—*Daniel* v. *Gosset* (4) is on all fours with the present case.

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(1) 4 Madd. 11.
(2) 16 Beav. 579.
(3) 16 Beav. 581.
(4) 19 Ibid. 478.

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[Mr. *Jessel*, Q.C., *amicus curiæ*, stated that he had been counsel in that case, that the decision had been appealed from, and that, under the advice of counsel, the appeal was compromised by the parties who succeeded in the Court below giving up half the fund to their opponents.]

Mr. *W. Pearson*:—There is no gift to the children except in the case of their father leaving issue; the only gift to them is contained in the direction to pay and divide the fund; and there is a gift over if the son should leave no child, or all should die under twenty-one. All these circumstances shew that the testator had in his mind the division of the fund at his son's death. If all the son's children had attained twenty-one and died in their father's lifetime, none of them would have taken any interest; yet it will be contended that if only one of them survived their father, all those who pre-deceased him would be let in to share. This would be a forced construction of the will.

Mr. *Owen*, for the widow and universal legatee of *James Warrington La Grange*, submitted that the two children who attained twenty-one in their father's lifetime were entitled to share in the fund. He was not further called upon.

Mr. *Phear*, for the trustees of the will.

Lord Romilly, M.R.:—

I think that the interests taken by the children of *James Warrington La Grange* became absolutely vested on their attaining twenty-one, and that there is nothing in the will to divest these interests: the words "with benefit of survivorship" refer to the period when the shares became absolutely vested, and not to the time of payment. The fund, therefore, will be divided into five shares, and two of these must be paid to the representatives of the children who attained twenty-one but died in their father's lifetime.

Solicitors: Messrs. *Kinsey & Ade*; Messrs. *Kempson, Trollope, & Winckworth.*

SCHOLEFIELD *v.* LOCKWOOD.

M. R.
1868
Dec. 19, 22.

Solicitor and Client—Defendant to Foreclosure Suit—Charge for Costs—23 & 24 Vict. c. 127, *s.* 28.

S. and *D.* were respectively entitled to one-third and two-thirds of a moiety of certain real estates subject to mortgages thereon. *S.* was also entitled to a charge on the other moiety in respect of certain judgment debts due to him. *S.* filed a bill for redemption and foreclosure, to which *D.* was a Defendant. A decree was made whereby it was declared that certain sums ought to be charged on the moiety of *S.* and *D.* Upon an appeal by *D.*, the decree was varied in his favour; and he was also successful in resisting claims of *S.* in working out the decree. Before the general certificate in the suit was made, *D.* became bankrupt, and his solicitors presented a petition praying for a declaration that they were entitled to a charge on his estate and interest for the amount of their costs, and for a sale of such estate and interest, and application of the proceeds of sale in payment of the costs:—

Held, that the estate and interest of *D.* was property preserved in the suit within the meaning of 23 & 24 Vict. c. 127, s. 28; and that the Petitioners were entitled to a charge and sale as prayed for.

9 Eq 3
118 [illegible]
13 Eq 502-4
[illegible]
20 D 365
306
24 Ch D 547
550

BY indentures of lease and release dated the 25th and 26th of July, 1832, *Thomas Dutton,* who was then entitled in fee to three estates known as the *Woodhouse* estate (subject to a mortgage for £3000, the interest of which was payable to his wife, *Hannah Dutton,* during her life for her separate use), the *Rockingham* estate, and the *Wood Lane* estate (subject to a mortgage for £1400), conveyed all three estates to the use of himself for life, with remainder to the use of such persons as he and his wife should jointly appoint, and subject thereto, to the use of *Hannah Dutton* for her life, with remainder as to one moiety (hereinafter called *Thomas Dutton's* moiety) to himself in fee, and as to the other moiety (hereinafter called *Hannah Dutton's* moiety) to such uses as *Hannah Dutton* should, notwithstanding coverture, appoint, and subject thereto, to herself in fee. And it was thereby declared that if *Thomas Dutton* should thereafter pay off any part of the £3000 or £1400 he should to that extent be entitled to stand in the place of the mortgagees.

In 1837, Mr. and Mrs. *Dutton,* by virtue of the power of joint appointment contained in the settlement of 1832, mortgaged the *Rockingham* and *Wood Lane* estates for £1000. This mortgage, as well as that on the *Wood Lane* estate for £1400, subsequently became vested in *Charles Turner Lockwood.*

In 1840, *Thomas Scholefield* recovered judgment in an action at law against *Thomas Dutton* for £1600 and costs; and subsequently he became the assignee of another judgment which was recovered against *Dutton* in the same year for £250 and costs. Both judgments were duly registered.

Thomas Dutton took the benefit of the *Insolvent Debtors' Act* in 1841; and *John Garland* was appointed assignee in the insolvency.

In 1857, *Hannah Dutton*, in exercise of the power reserved to her by the settlement of 1832, appointed her moiety of the three estates (subject to her life interest therein and to the mortgages subsisting thereon) as to two-thirds thereof to *William Ryder Durant* in fee; and as to the remaining third to *Mary Gill, Thomas Gill, Sarah Gill,* and *Susan Kirkland,* as tenants in common in fee. Subsequently the last-mentioned third became vested in *Thomas Scholefield.*

Thomas Dutton died in 1858, and *Hannah Dutton* in 1859.

In 1861, *Thomas Scholefield* filed his bill in this suit against *Charles Turner Lockwood, John Garland,* and *William Ryder Durant,* alleging that *Charles Turner Lockwood* had, under powers of sale in his mortgages, sold part of the mortgaged premises, and had for many years been in receipt of the rents and profits of the rest, and that all that was due to him on the mortgages had long since been satisfied; and seeking relief on the footing of these allegations, and also seeking to establish a charge on *Thomas Dutton's* moiety of the three estates in respect of the two judgment debts of £1600 and £250.

In 1863 the Master of the Rolls made a decree in the suit whereby it was declared (amongst other things) that the sums of £1400 and £1000 charged upon the *Rockingham* and *Wood Lane* estates, and also any sums expended by the mortgagee in lasting improvements, and also his costs, charges, and expenses, ought to be considered as charged in moieties, one moiety on *Thomas Dutton's* moiety of the estates, and the other moiety on *Hannah Dutton's* moiety thereof, and it was also declared that *Charles Turner Lockwood* ought to account for the rents, profits, investments and proceeds of sale of the mortgaged premises, and that any surplus which accrued during the life of *Thomas Dutton* (after payment of the mortgagee's interest and ordinary just allowances), and the investments of such surplus, and the profits of such investments, ought to be considered as the property of *Thomas Dutton*, or those claiming under him; and that so far as any portion of such surplus was applied in lasting improvements, or ultimately in payment of the capital sums, or of the costs, charges, and expenses of the mortgagee, one moiety of such portion was chargeable for the benefit of *Thomas Dutton* and those claiming under him on *Hannah Dutton's* moiety of the premises which remained unsold; and it was also declared that the Plaintiff was, by virtue of his judgments, entitled to a charge on *Thomas Dutton's* moiety, and on every charge on *Hannah Dutton's* moiety to which *Thomas Dutton*, or those claiming under him, were entitled. Various accounts and inquiries were thereby directed, and, in particular, an inquiry what sum was chargeable upon *Hannah Dutton's* moiety of the mortgaged premises which remained unsold, and what was two-thirds of that sum; and it was directed that upon *William Ryder Durant* paying to the Plaintiff what should be certified as such two-thirds within six months after the date of the Chief Clerk's certificate, the legal estate in two-thirds of *Hannah Dutton's* moiety should be conveyed to him, and in default that he should be foreclosed.

From this decree *Durant* appealed; and upon the appeal the decree was varied, by directing that in case it should appear that *Hannah Dutton* had sustained any loss by reason of the interest on the sum of £3000 having been allowed to fall into arrear in the lifetime of *Thomas Dutton*, the amount of such loss as it stood at the death of *Thomas Dutton*, together with interest, ought to be set off against and deducted from the amount by the decree declared to be chargeable for the benefit of *Thomas Dutton* and those claiming under him on *Hannah Dutton's* moiety; and an inquiry was directed for the purpose of ascertaining the amount of such loss.

In prosecuting the last-mentioned inquiry, the Plaintiff adduced evidence to shew that the *Woodhouse* estate was not worth £3000. Ultimately, by a separate certificate, the Chief Clerk found that it

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was worth £3280; this certificate was confirmed by the Master of the Rolls, whose decision was affirmed on appeal.

Throughout these proceedings Messrs. *Strother* acted as the solicitors of *William Ryder Durant,* and their bill of costs against him amounted to upwards of £500, a large proportion of which represented costs out of pocket. In April, 1868, *Durant* was adjudicated bankrupt; and his estate was likely to realize less than 20*s.* in the pound. Under these circumstances Messrs. *Strother* presented a Petition praying, 1, for a declaration that they were entitled to a charge for the amount of their taxed costs upon all the estate or interest of *Durant* or his assignee in bankruptcy, in the mortgaged premises; 2, for taxation of their bill of costs; 3, for a sale of the estate and interest, and payment of their costs out of the proceeds.

The Chief Clerk had not made his general certificate in the suit, but it was stated in the Petition, and verified by affidavit, that the Petitioners believed that the result of the accounts and inquiries directed by the decree would be to shew that *Durant's* interest was a valuable one.

Durant's assignee was served with the Petition, but did not appear.

Mr. *Montague Cookson,* for the Petitioners:—

We claim a charge by virtue of the statute (23 & 24 Vict. c. 127, s. 28), upon *Durant's* interest, which is "property recovered or preserved" in the suit. The suit was in the nature of a redemption and foreclosure suit, but the decree worked out all the equities, and established *Durant's* right. Further, by the appeal and the proceedings under it, results favourable to *Durant* have been arrived at, and the chance of foreclosure has been lessened. On the whole, therefore, his interest may fairly be said to have been recovered or preserved in the suit. In *Wilson* v. *Round* (1) the costs of a Plaintiff in a foreclosure suit were declared to be a charge on his interest.

The MASTER OF THE ROLLS:—I can understand that, but is there any case in which a similar order has been made where the

(1) 4 Giff. 416. 10 Jur NS 34

client was a Defendant to a foreclosure suit? That is what you are now asking, and my difficulty is, that you have only got a decree entitling you to redeem upon paying a certain amount, and until you make that payment it does not appear that your client will have any property recovered or preserved for him.

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Mr. *Cookson*:—It is stated that *Durant's* interest is a valuable one; and if it is not, no harm will be done by the order; the only result will be that we shall get no benefit from it. No case appears as yet to have been decided in which the client was Defendant to a foreclosure suit; but in *Bailey* v. *Birchall* (1) it was decided that the solicitor was entitled to a charge although it might turn out that the client had not any interest in the property. The only other case bearing on the subject is *Haymes* v. *Cooper* (2), which shews that *Durant's* assignee is the only person whom it is necessary to serve.

22 Dec. LORD ROMILLY, M.R.:—

I have looked at this Petition very carefully and I think it comes within the Act. The words of the Act are, "recovered or preserved." This interest is clearly not "recovered," but I think it may fairly be said to be "preserved." I think the Act is intended to be construed liberally, and solicitors ought not to be deprived of their lien in these matters where there has been a good deal of work done. If there is anything coming out of the estate to the bankrupt, and that has been preserved by the solicitor, he is entitled to his lien. If there is nothing coming to him the lien will amount to nothing. I therefore make the order as prayed.

2 ChD 365

Solicitors: Messrs. *Hawkins, Paterson, Snow, & Burney.*

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(1) 2 H. & M. 371. 11 Jur NS 57.
(2) 33 Beav. 431. 10 Jur NS 303.

V.-C. S.

1868

Dec. 3.

In re CEFN CILCEN MINING COMPANY.

Mining Company—Article of Association against borrowing—Overdrawn Account—Bills of Exchange by Directors.

Money due to a bank on bills of exchange drawn and accepted by directors of a company, indorsed by the company and discounted by the bank, the proceeds of which were applied in satisfying an overdrawn account of the company with the bank, and the balance for the benefit of the company:—

Held, not to be due as upon a loan within the meaning of the articles of association, which prohibited the directors from contracting any loan beyond £500 without the consent of the shareholders.

8 Eq 503.
7 Ch 797
5 PC 4.8
5 QBD 486
9 QBD 460
22 ChD 65-
66,-8

THE *Cefn Cilcen Mining Company* was formed for the purpose of carrying on mining operations at *Cefn Cilcen*, in the county of *Flint*. It was registered on the 30th of August, 1860, and ordered on the 19th of July, 1867, to be wound up. The company had an account with the *North and South Wales Bank*. This account was overdrawn to the extent of about £200, and the company was otherwise indebted. Bills of exchange amounting in the aggregate to £1122 10*s*. were drawn by *J. D. Pugh* and accepted by *Thomas Edgworth* (both directors of the company), and indorsed by the company to the bank, by which they were discounted. Out of the proceeds of these bills the overdrawn account with the bank was liquidated, and the residue was applied to the purposes of the company. At the date of the order for winding up there was due to the bank on account of the bills of exchange, which had been presented at maturity and dishonoured by the company, a sum of £1039 6*s*. 3*d*. The 56th of the company's articles of association provided that the directors should not contract any loan beyond £500 without the consent of the company by a special resolution.

In the years 1861 to 1865 inclusive, reports and balance sheets of the directors were adopted and passed at the general meetings, and at the meeting of the shareholders in 1865 they expressed a strong opinion that the liabilities of the company should be reduced, and that the directors should make a call with that view, but there was no evidence that any debt of the company which exceeded the sum of £500 had ever been brought before the shareholders at a general meeting, and such special resolution

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passed as required by article 56. In the winding-up the bank was allowed by the liquidator to prove for £500. *Eliza Jane Edgworth*, the executrix of *Thomas Edgworth*, having paid the bank the balance of £539 6*s*. 3*d*. due on the bills, brought in a claim for that sum; but the liquidator contended that as under article 56 the limit of borrowing was placed at £500, and that as the bank had been allowed to prove for that amount, this claim could not be allowed, and that being the view of the Chief Clerk he certified to that effect.

This was a motion on an adjourned summons by Mrs. *Edgworth*, claiming to be paid the sum of £539 6*s*. 3*d*.

Mr. *Greene*, Q.C., and Mr. *Freeling*, for Mrs. *Edgworth*, contended that the company, as indorsers, were liable to the bank on this account, which was in effect a drawing account for the purposes of the company, and not a borrowing within the meaning of the 56th article of the articles of association of the company. The directors *Pugh* and *Edgworth* were merely in the position of sureties, and as *Edgworth's* executrix had paid the bank out of her husband's estate, she must be recouped by the company the sum which she had paid: *Re German Mining Company* (1). They were stopped by the Court.

Mr. *Dickinson*, Q.C., and Mr. *Brookshank*, for the liquidator:—

The case referred to bears no resemblance to this whatever. This is not the case of a person becoming a creditor by paying a debt of the company; nor is it the case of an overdrawn banking account. The ordinary rule applicable to partnerships in allowing the use of each others names for the purposes of trade does not apply here. These two directors being of opinion that this company should be carried on, borrowed from the bank sums beyond the limit allowed by the article of association without a special resolution; and this is an attempt to obtain indirectly that which the bank could not get directly. At the time when the first bill for £500 was given the company had overdrawn the sum of £198. That sum was paid out of the proceeds of the bill and the company drew against the balance, and it is, in fact, a case of bor-

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(1) 4 D. M. & G. 19. 10 Jan 7/0

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rowing. Where is the difference between borrowing £1000 on the security of bills of exchange and directors obtaining money from the persons who happen to be the company's bankers, and then giving bills of exchange to that extent? There is a clear distinction between overdrawing a banking account and obtaining from your bankers moneys on bills. This was a borrowing which the 56th article of association was intended to prevent.

SIR JOHN STUART, V.C.:—

In this case two directors of this company incurred an obligation —the one by being the drawer and the other the acceptor of bills of exchange—and they incurred that obligation under such circumstances as that, the company having had the benefit of the moneys produced by the bills, they or one of them is entitled to be considered a creditor of the company as from the time he paid any amount due on the bills. What is meant by the article 56 against borrowing beyond the sum of £500, is, in my opinion, a very different thing from this transaction. Borrowing and lending are things perfectly well understood, and although the procuring of money by means of a bill of exchange confers the same benefit on the person who procures it as if he were to borrow the amount, yet it is impossible to consider transactions upon bills of exchange given in this manner as borrowing and lending within the meaning of the 56th article of the company's articles of association. It has been well decided that the balance due to a bank by a company which keeps an account with it, and has had the benefit of the money, is a debt, but not a loan in the proper sense. The proper order will be to direct that Mrs. *Edgworth*, who has already shewn that she has paid the money, be admitted a creditor of the company for the sum of £539 6*s*. 3*d*.

Solicitor for Mrs. *Edgworth*: Mr. *W. Raimondi.*
Solicitor for the Liquidator: Mr. *Pulbrook.*

In re ASIATIC BANKING CORPORATION.

V.-C. S.
1868
Dec. 8.

ROYAL BANK OF INDIA'S CASE.

Contributory—Ultrà Vires—Company a Shareholder.

A banking company (*A.*), unauthorized to accept as security shares in a public company except by a transfer to a third person, took a transfer of shares in a banking corporation (*B.*) in which they were named as transferees. This was executed not under seal but by the signature of the manager, pursuant to a resolution of the board. The banking company (*A.*) dealt with such shares as their property and received dividends in respect of some of them:—

Held, that company *A.* were properly placed on the list as contributories of the banking corporation (*B*).

Affd. by L.JJ. 4 Ch. 252.

THIS was a summons on behalf of the *Royal Bank of India*, that the certificate of the Chief Clerk might be varied by removing the name of the said bank from the list of contributories of the *Asiatic Banking Corporation* as the holder of 605 shares.

Both banks had been established recently in *India*, and both, after carrying on business for a short time, had passed into liquidation.

The articles of association of the *Royal Bank of India* contained the following clauses:—

"3. That the business of the company shall be to carry on the trade of bankers in all its branches, and to do and transact all matters and things incidental thereto, as now existing, or which it may at any time hereafter be lawful for establishments for carrying on banking, or for dealing in money, or in notes, bills, or other securities for money, to do or transact, and such business shall be fixed and determined and in all respects regulated by such rules, regulations, and bye-laws as the directors of the company may from time to time make, which shall be entered in a book kept for that purpose, and signed by three of the directors.

"68. That the board of directors shall have generally the entire management, superintendence, control, ordering, and directing of the affairs, business, concerns, and property of the company, including power to buy, sell, or take on lease, land or buildings, or both, for the use of the company as occasion shall require, and shall in every case not provided for, or inadequately provided for, by these presents, or by any rules or regulations hereafter made or established by any general meeting, have full power to regulate their own proceedings and the mode of conducting their business, and to act in such manner as they may think best calculated to effect and accomplish the objects and purposes for which the company is established, and to promote the welfare of the company, and also have and assume all powers which are requisite or necessary to enable them to carry into effect the objects and purposes for which the company is established, subject, nevertheless, to the provisions and restrictions contained in these presents and Act XIX of 1857 (*India Banking Companies Act*).

"73. That the board of directors, in common with the general meetings, shall have full power and authority to direct the use and affixing of the common seal of the company, but the said seal shall in no case, and upon no account, be used or be affixed to any instrument or document, save in accordance with an order or resolution of a general meeting, or of the board of directors, or of a committee of the board of directors authorized by the board of directors to use or affix the said seal."

Among the bye-laws were the following:—

"*Securities.*

"2. The bank may accept lands, houses, ships, shares in public companies, or any other property, as security for a debt absolutely and *bonâ fide* previously due and owing, or as security for the payment of any sum for which any person or persons may have rendered himself or themselves liable to the bank, but such security is never to be taken for an original loan, nor are shares in public companies so accepted as security to be transferred to the bank, so as to involve it in the liabilities of such companies.

"1*st*—*Loans and Local Advances.*

"The amount fixed on as a maximum for a loan is £10,000. This sum has been determined upon to admit of the bank accommodating its several customers, and avoiding an inconveniently large loan to any one of them, although the security may be beyond question."

The *Royal Bank of India* carried on the ordinary business of bankers in *Bombay*, in 1860 up to the 1st of May, 1867, and was in the habit of advancing moneys to its customers, taking, *inter alia*,

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as collateral security shares in banking and other companies. The earlier practice was to take from the persons to whom advances were made, together with the deposit of the memorandum of allotment or share certificates, deeds of transfer executed by the proprietor, but with the name of the transferees in blank, and when the advance was repaid, the transfer and certificates were returned, otherwise the shares were sold and the transfers filled up and delivered to the purchasers. In consequence of a decision of the *Bombay* Court that some of such shares so held by the bank, but not registered in the name of the bank, were liable to be taken in execution by creditors of the persons in whose names they were registered, the practice then arose among banking companies to have the shares transferred to themselves, or to some person in trust for them. The *Royal Bank of India* held a large number of shares in public companies, and, among others, shares in the *Asiatic Banking Corporation,* which had been deposited by customers by way of security. In March, 1865, a resolution was passed by the directors that, except shares in the *Royal Bank* only, no shares of limited and incorporated companies should be advanced on, and that no advances should be made on any shares on which less than half the capital was paid, and that any shares upon which loans were granted should be registered in the name of the manager, or in the name of the bank. In conformity with this resolution nearly all the shares held by the bank as security, including the 605 shares in the *Asiatic Banking Corporation,* were transferred to the bank as transferee, but the transfers were not executed under the corporate seal, but by the signature of the manager. The bank sold some of the shares and took dividends on others.

On the 1st of May, 1867, a resolution was come to to wind up the *Royal Bank* voluntarily.

The *Asiatic Banking Corporation* was also directed to be wound up, and the *Royal Bank of India* was placed on the list of the contributories of the *Asiatic Bank* in respect of the said 605 shares.

Mr. *Karslake,* Q.C., and Mr. *Fry,* for the *Royal Bank of India* :—

By the articles of association and the bye-laws the directors acting for the bank had no power to advance money under any circumstances on the security of shares in a public company, and

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even as to an antecedent debt, they had no authority to take shares in such a way as to involve the bank in any liability. It is quite clear, therefore, that the proceedings of the directors were unauthorized and not binding on the shareholders of the company.

But, secondly: the bank was a corporation, and could only bind itself under its corporate seal, while in this case all that has been done is to affix the manager's signature to the transfer, which is a simple nullity.

Further, the *Asiatic Banking Corporation* had no power to accept a public company as a shareholder.

[*In re Barned's Bank* (1) was cited.]

Mr. *Dickinson*, Q.C., and Mr. *Kekewich*, appeared to oppose the summons, but were not called on.

Sir John Stuart, V.C.:—

These shares were taken by the *Royal Bank of India* to secure a debt due to them.

It has been argued that the bank are not authorized by their articles of association and bye-laws to take shares in their own name as security, and this appears to be the fact. But the bank having accepted the shares as security, took the next step of procuring a transfer to themselves in their own name.

Then it is said that the transfer is not under seal, and that from want of proper formalities the shares were never duly transferred. But what followed? Not only were the shares taken, but they were transferred to the bank in conformity with a resolution of the directors, and the transfer executed by the manager on behalf of the bank. The matter does not rest there: the bank having got the shares so transferred, deal with them as their own, sell some of them, receive the dividends on others, and only when the possession of the shares appears likely to occasion a liability seek to repudiate the transaction. It is too late to take the objection, and the summons must be dismissed with costs.

Solicitor for the *Royal Bank of India:* Mr. *W. R. Harris.*

Solicitors for the Liquidator of the *Asiatic Corporation:* Messrs. *Freshfields.*

(1) Law Rep. 3 Ch. 105.

MICHAEL *v.* FRIPP.

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Nov. 3.

Merchant Shipping Act (17 & 18 *Vict. c.* 104), *s.* 99—*Guardian of Infant Shipowner—Power to sell or Mortgage.*

The guardian of a registered infant owner of a ship, has no power under the *Merchant Shipping Act*, s. 99, to sell or mortgage the ship on behalf of the infant.

Confirmed on appeal [illegible]

THIS bill was filed by *John W. Michael*, an infant, by *John Wilson* his grandfather, as next friend.

In the early part of the year 1865, the Defendant, *Jacob Michael*, the father of the infant Plaintiff, being the owner of a ship called the "*Bloomer*," transferred the ship to the Plaintiff, who was then eighteen years of age, and a clerk in his own counting house. The value of the ship was between £2500 and £3000.

By an order of the Master of the Rolls, dated the 5th of May, 1865, *Jacob Michael* was appointed guardian of the estate of the Plaintiff during his minority, and on the 9th of September following the ship *Bloomer* was registered in the name of the Plaintiff.

In August, 1865, the Defendants, Messrs. *Fripp & Begbie*, who were merchants, entered into a contract with *Jacob Michael* to charter the ship *Bloomer*, and also two other ships, of which *Jacob Michael* was the owner, for the conveyance of timber; but it was required by *Fripp & Begbie* that considerable repairs should be done to all three ships, and for the purpose of these repairs various sums of money were from time to time advanced by *Fripp & Begbie*, and eventually, in the month of November, 1865, *Jacob Michael*, acting as the guardian of the Plaintiff, affected to mortgage the ship *Bloomer* to the Defendant, *W. Fripp*, as a trustee for his firm, to secure the balance of the moneys which should be ultimately found due to *Fripp & Begbie* on their account current with the said ship, and the mortgage was thereupon registered at the port of *London*.

In December, 1865, *W. Fripp* transferred his mortgage security to the Defendants, the *Maritime Credit Company*, as collateral security for £2000, for which sum the company had discounted bills for *Fripp & Begbie*, and the *Maritime Company* had notice

Applⁿ for leave to file supplemental bill of review on new matter discovered since decree refused S.C. W.N. (1870) [illegible] that *J. Michael* had executed the mortgage of November, 1865, as guardian of the Plaintiff, and in the exercise only of such powers as are given to a guardian under the provisions of the *Merchant Shipping Act,* 1854 (17 & 18 Vict. c. 104).

Further sums of money having been advanced by *Fripp & Begbie* in respect of the ship *Bloomer,* an agreement was entered into on the 13th of January, 1866, between *J. Michael* and *Fripp & Begbie,* under which *Fripp & Begbie* were to complete the repairs of the ship, and to have the entire control over her as to chartering and otherwise, and to pay and debit in account against the ship all necessary charges, including all moneys already paid or which should be paid, in respect of repairs or outfit; and upon the return of the ship to *England,* after her intended voyage, to make out an account, and in the event of any deficiency due from *J. Michael* not being paid, then the Defendants, *Fripp & Begbie,* were to be at liberty to sell the ship by auction and retain the amount due to them.

In further performance of this agreement, *J. Michael* executed an absolute bill of sale of the ship *Bloomer* to *W. Fripp,* which bill of sale was registered at the port of *London.*

On the 24th of March, 1866, the ship *Bloomer* foundered near the *English Channel,* and was wholly lost.

In September, 1866, *Fripp & Begbie* became unable to meet their engagements, and executed a deed of inspectorship for the benefit of their creditors.

The loss alleged to be due upon the *Bloomer,* after crediting the amount received for freight and insurances, was £4442. The bill prayed an account, and that the Defendants, *Fripp & Begbie,* should not be allowed to charge for their disbursements in respect of the ship any greater sum than a sum equivalent to the difference between the value of the ship at the time she was taken possession of by the Defendants and the amount for which the ship was insured, and that the *Maritime Company* might be restrained from paying to *Fripp & Begbie* any money which should come to their hands in respect of insurance upon the ship.

Mr. *Cotton,* Q.C., and Mr. *Hunter,* for the Plaintiff:—

The only question in this case is, whether the guardian of an

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infant owner of a ship has power to deal with the ship as if he were himself the owner. This depends upon the 99th section of the *Merchant Shipping Act* (17 & 18 Vict. c. 104) (1).

The infant was the registered owner of this ship, the *Bloomer*, in September, 1865, and his father, *Jacob Michael*, was appointed his guardian by the Court of Chancery. No doubt, the *Merchant Shipping Act* gives power to the guardian of an infant to do certain acts as a substitute for the infant, but these acts have reference only to the effectual registration of the ship, and to such formal acts as the registered owner might be required to execute; but it never could have been the intention to permit the guardian to mortgage or dispose of the ship of an infant. There is no clause in the Act giving such power to a guardian. The title of *Fripp & Begbie*, therefore, was a mere nullity, and they could convey no title to the *Maritime Company*, who had notice of the fact that *Jacob Michael* was the guardian of his son, and they could acquire no better title than *Fripp & Begbie* had to give them. If a party gets on the registry by means of a claim under some one who has no title, the Court may look behind the registry to see how the title originated. That was decided in *Orr* v. *Dickinson* (2). In this case it is not disputed that the infant was the owner, and that his father acted on his behalf as his guardian, consequently the case is entirely dependent upon the construction of the Act.

Mr. *Glasse*, Q.C., and Mr. *Daly*, for the persons representing Messrs. *Fripp & Begbie*:—

The 99th section of the *Merchant Shipping Act* is conclusive that the guardian of an infant owner of a ship may do any act in respect of the ship which the infant himself could have done. There is no clause restricting the 99th section, and it is evidently a most essential thing that some person should have power to act for an infant in property like a ship. A ship cannot be kept unused, but an active ownership must constantly be exercised. If she wants repair, it may be necessary to make a large outlay in that respect, and the only means of paying that outlay may be by mortgaging the ship. It is quite right, therefore, that the guardian should be invested with absolute control over the ship.

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(1) Sect. 99 is as follows: "That if any person interested in any ship or any share therein, is, by reason of infancy, lunacy, or other inability, incapable of making any declaration, or doing anything required or permitted by this Act to be made or done by such incapable person in respect of registry, then the guardian or committee, if any, of such incapable person, or if there be none, any person appointed by any Court or Judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration or doing such thing, may make such declaration, or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of such incapable person; and all acts done by such substitute shall be as effectual as if done by the person for whom he is substituted."

(2) Joh. 1. 5 Jur. NS 678

Mr. *Cotton* in reply.

SIR R. MALINS, V.C.:—

The transactions brought before the Court in this case are of a very remarkable character, and I should have been glad if I could have felt myself warranted in coming to a different conclusion to that at which I am compelled to arrive. It appears that Mr. *Michael*, the father, in the early part of the year 1865, gave this ship, the *Bloomer*, to his son, who was then in his eighteenth year, and was a clerk in his own counting-house. To that part of the transaction there could be no objection. Accordingly the ship, on the 9th of September, 1865, was registered in the name of the son. Now it is clear that a ship being a property of a peculiar description, nothing can be more inconvenient than a minor being a shipowner, unless some person has the complete power of representing him for the purposes of selling, mortgaging, repairing, and dealing with it as a mercantile commodity; and I have no doubt that the intention of the father when he made over the ship to his son was, that he (the father) should have the same control over it as if no such gift had been made. Accordingly, when he wanted money he mortgaged the ship in a manner which amounted to a sale; and one cannot but feel deep regret that having so dealt with it, when he found himself incapable of performing his own obligations by repaying the money he had borrowed, he can be found capable of putting his son forward to file a bill as an infant to claim this ship as his own. That this claim should be persevered in by the son after he has come of age, distinctly proves that the suit was originally and is now the suit of the father. These observations only go to the nature of the transactions. The Defendants are not at liberty to impugn the gift of the ship to the son, because the answers of the company and of *Fripp & Begbie* admit that the son was made the owner of the ship, therefore, that being admitted, the case presented to me is that the infant is the owner, and that the father has, not with reference to the ownership of the ship, but generally with reference to any estate he may possess, been appointed guardian by the Court of Chancery. That appointment having been made on the 5th of May, 1865, the son was not at that time the owner of the ship, as the entry on the register was made on the 9th of September following. Until that time the father was the registered owner. The transfer to Messrs. *Fripp & Begbie* is by the father, and when they made the transfer to the *Maritime Credit Company* they had notice of the title, and knew they had only such title as the guardian of an infant could confer, and the *Maritime Credit Company* had the same knowledge of the nature of the security. The case of *Orr* v. *Dickinson* (1) has been cited to shew that although the name of the registered owner is *primâ facie* evidence of title, it is not conclusive evidence. It is not a fact of very great importance in this case, because here the actual title and the registered title are identical. Then *Fripp & Begbie* having taken with full knowledge that they could only have such title as the guardian of an infant shipowner could confer, the *Maritime Credit Company* must be considered to have taken the transfer of precisely the same interest. This suit then raises the question, what is the extent of the right of the guardian of an infant over a ship of which the infant is the owner. It has been very strongly argued on one side that the 99th section of the *Merchant Shipping Act*, which all parties agree is the only section applicable to the subject, gives to the guardian as unlimited a control over the ship of the infant as if the guardian himself were owner, leaving him liable to account to the infant for the proceeds, whether by way of mortgage or sale. On the other hand, it has been argued that the 99th section has no application to a sale or mortgage, but that it merely gives the guardian the power of doing formal acts, of making the necessary declarations, and so forth, and that it does not extend to the power of selling or mortgaging. There can be no doubt that the guardian of the estate of an infant has very considerable powers; he must do all acts necessary to preserve the estate; therefore, in the case of land, he must have the power of doing the necessary repairs; in the case of a ship he must have the power of insuring, repairing, and doing all necessary things which would go to preserve the ship. In some cases, according to mercantile usage, that would seem to involve the necessity of mortgaging the ship, or of giving a lien upon it for the amount of the repairs. Whether it was the intention of the Legislature to give the guardian that power it is very difficult to say; but this does appear to me perfectly clear, that if it had been the intention of the Legislature to give the guardian of an infant shipowner such extensive powers as have been contended for on the part of the Defendants in this case, we might have expected to find, in very clear and explicit language, an enactment that it should be lawful for the guardian of every infant, or the committee of every lunatic, or other persons under disability who are the owners of ships, to sell, mortgage, or deal with the ships in any such manner as the owner might have done, and in the case of an infant, as if he had been of full age or under no disability. But the Act of Parliament does not point to anything of the kind; it does not point to selling or mortgaging. The words evidently go to the minor unimportant acts, falling far short of an absolute disposition of the thing which is to be protected and taken care of. With respect to the last clause: "And all acts done by such substitute shall be as effectual as if done by the person for whom he is substituted," one would have expected to find added, "as if such person had not been under any incapacity;" but that is not added. Therefore, with every inclination to put the interpretation which would enable this guardian to dispose of the ship, I am bound upon the very restricted language of this section to come to the conclusion that it does not authorize the guardian of an infant shipowner either to sell it or to mortgage it. It may possibly go to the extent of giving a lien on the ship for the purpose of doing necessary repairs, or of enabling the guardian in the ordinary course of things to manage the estate of the infant. But in this case, if I acceded to the argument for the Defendants, I must come to the conclusion that wherever there is an infant shipowner, the guardian has an absolute power as if he were himself the owner. I am unable upon the language to come to that conclusion. The consequence is, that there being no question before the Court as to the fact of the infant being the absolute owner, I must decide that the infant is entitled to the relief asked by this bill. The form of the decree will perhaps require some care; but it will come to this, that the security upon the ship was invalid, and that the Defendants are not entitled to any other lien upon the ship, or the proceeds of the ship, or the policy moneys which have been substituted for the ship, than the outlay for necessary repairs. No costs on either side.

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(1) Joh. 1. 5 Jur NS 673

Solicitors: Messrs. *Wetherfield & Norton*; Mr. *J. I. Solomon*; Messrs. *Davies, Son, & Campbell.*

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Dec. 7, 11.

12 Eq. 5[illegible]

In re AGRA AND MASTERMAN'S BANK.

CANNAN'S CLAIM.

Winding-up—Official Liquidator—Remuneration—Regulation of May, 1868—*Companies Act*, 1862, *s*. 93.

1. In determining the amount of remuneration payable to an official liquidator under the winding up of a bank commenced before the order of May, 1868, the Court, having regard to the circumstances under which the bank stopped payment, and the amount of assets and dividends, refused to allow payment to the liquidator upon the basis of a percentage.

2. The Court will not increase or diminish the amount of remuneration by reason of profit or loss having resulted from the operations of the liquidator.

3. Having regard to the Order of May, 1868, the remuneration of the liquidator must be estimated by the time and labour employed by himself and his clerks; but in such calculation the services of clerks of the bank who have been employed by the liquidator and paid out of the assets of the bank in liquidation, will not be included.

THIS was an adjourned summons for the purpose of determining the amount of remuneration payable to Mr. *Cannan* as liquidator of the *Agra and Masterman's Bank, Limited.*

On the 7th of June, 1866, the bank stopped payment. On the 22nd of June a special resolution was passed for winding up voluntarily, and on the 23rd of June, 1866, an order was made for continuing the voluntary winding-up subject to the supervision of this Court, and Mr. *Cannan* was appointed liquidator. In December, 1866, the Vice-Chancellor, Sir *W. Page Wood,* sanctioned an arrangement which had been agreed to by the large majority of the shareholders and creditors for resuscitating the business by the formation of a new bank, to be called the *Agra Bank, Limited,* which was to take over the assets and liabilities of *Agra and Masterman's,* and liquidate the same as a working bank, and continue that portion of the business formerly carried on by the *Agra and United Service Bank.*

The debts and credits of the concern were very considerable, and the creditors very numerous. Assets to the amount of £3,700,000 had been collected by the liquidator, who paid a dividend of 5*s*. in the pound, amounting to £1,800,000, in September, 1866, and would have paid another dividend of 6*s.* 8*d.* in the pound in January, 1867, but for the order approving the resuscitation agreement, in pursuance of which, on the 11th of January, 1866, Mr. *Cannan* handed over the assets to the *Agra Bank, Limited.* Mr. *Cannan* continued to act in the liquidation, and although the claim as originally made was for his remuneration up to the 31st of January, 1867, a further period, ending the 30th of May, 1868, had to be taken into consideration.

No arrangement had been come to in respect of this remuneration, either when the order was made for resuscitating the business or at any other time.

In February, 1867, Mr. *Cannan* sent in his claim for £25,000, which was stated, in the accompanying affidavit, to be in respect of the services rendered by himself and his partners, and their confidential assistant (Mr. *E. J. Gardiner*), and staff of clerks, under his (*Cannan's*) supervision and order, in liquidation of the bank up to the 31st of January, 1867, and in respect of the services rendered abroad by Mr. *Richard Barnes* as his attorney and substitute, and the several persons employed as managers and clerks at the branches and agencies of the bank, up to the 31st of January, 1867; such sum of £25,000 being understood to be exclusive of, and in addition to, the moneys paid or payable to *Barnes*, or the several persons employed at the branches or agencies, by way of salary, remuneration, or allowance, for their respective services, and the bank being charged with the amounts paid on such accounts. The sum of £25,000 was stated as being intended to cover and include all payments made or to be made by *Cannan* for wages, salaries, or remuneration of assistants or clerks employed by him or his firm in connection with the liquidation of the bank in this country up to the 31st of January, 1867.

It was also stated by Mr. *Cannan* in his affidavits, that the business of the liquidation was of a most complicated, onerous, and important character, involving financial and commercial transactions to the extent of £15,000,000 in debts and credits, with nearly 12,000 creditors; and the adjustment of accounts of great magnitude, all which required constant and unremitting attention and personal supervision, with immense mental pressure, care, and anxiety.

The £25,000 claimed was stated to be far less than the profits of

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which the bank had had the benefit, and to be not more than 12*s.* 6*d.* per cent. upon the moneys actually received and realized from the assets of the bank since he had acted as liquidator. The amount of the claim was also justified by—

(1). The immense and exceptional responsibility of such a liquidation.

(2.) The refusal of valuable business in order that he might devote himself entirely, day and night, to the liquidation.

(3.) The fact that no mistake had been made or loss incurred.

(4.) The benefit to the bank of £170,000 which was thus made up:—

(*a*) A profit of £20,000 by loans and investments in consols while the money was accumulating for the dividend.

(*b*) An increase of £100,000 in the value of Egyptian Bonds which *Cannan* might have sold, but ventured to hold for a rise in the market (which actually took place).

(*c*) An increase of £50,000 in the value of cotton which was also successfully held by *Cannan* for a rise.

It appeared that from the 8th of June, 1866, until the 31st of January, 1867,

Mr. *Cannan* and his partners had been employed 3377 hours.
Mr. *Gardiner* . . . . 1763 „
The clerks of the firm . . . . . 11,254 „

While from the 31st of January, 1867, until the 30th of May, 1868, Mr. *Cannan* had been employed . . 725 hours.
And his clerks . . . . 4835 „

The clerks and staff of the old bank had also been employed for upwards of 30,000 hours, for which they had been paid out of the moneys of the old bank, in addition to the three months' salary paid to them in lieu of the usual three months' notice.

The directors had suggested £7000 as a proper sum for Mr. *Cannan's* remuneration, but the shareholders declined to allow more than £5000.

In their affidavits it was insisted by the committee of shareholders that Mr. *Cannan* was only entitled to claim in respect of the time and attention that he had bestowed, and for his actual disbursements in respect of the clerks employed by him on the business of the liquidation. From the 18th of October, 1866, when

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the resuscitation agreement was approved by the shareholders, the active duties of the liquidator were very much suspended; while after the 11th of January, 1867, with the exception of the services of the clerks who were employed in balancing the books, the duties of the liquidator were not active or responsible, being confined almost entirely to such formal matters as were still in his hands under the resuscitation agreement. It was also stated that at the time of the stoppage there was a thoroughly efficient staff of clerks and managers at the head and branch offices, all of whom were at Mr. *Cannan's* disposal, and of whose services he might have had such use as he required. Further than this, all expenses of liquidation had been borne out of the funds of the bank without any personal responsibility or outlay on the part of *Cannan*, and in the case of the clerks who were dismissed with three months' salary, and then in some instances re-employed, the bank had had to pay for their services twice over. With respect to the alleged profit resulting to the bank from Mr. *Cannan's* financial operations, it was insisted that his calculations were fallacious, being based on the lowest price to which the securities and property had sunk during the commercial panic of 1866, when it was impossible to realize them at all, while he could not be entitled to increase his claim for remuneration on the ground of the subsequent rise in the value of securities. As to the investments for which Mr. *Cannan* claimed credit; if the money had been divided amongst the creditors earlier, the 5 per cent. interest which the debts carried would have been saved, and it was certain that Mr. *Cannan's* investments would not exceed or equal that amount. At the same time, while the risk of these investments fell upon the bank, Mr. *Cannan* derived collateral advantages from them (not in the way of direct pecuniary profit, but in the position of power and importance as to other banks afforded to him from having large sums of money ready to lend.)

Mr. *Cannan* had replied to these statements, and the affidavits, to which it is not necessary more particularly to refer, were very numerous on both sides (1).

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(1) In May, 1868, the following Order regulating the remuneration of official liquidators was adopted by the Master of the Rolls and Vice-Chancellors after having been sanctioned by the Lord Chancellor:—(3 Ch Exam)

"Every application by an official liquidator for remuneration must be sup-

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Sir *Roundell Palmer*, Q.C., and Mr. *Westlake*, for the committee of shareholders.

Mr. *Amphlett*, Q.C., for the directors of the old bank.

Mr. *Druce*, Q.C., and Mr. *Fooks*, in support of Mr. *Cannan's* claim.

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ported by an affidavit shewing the number of hours devoted by him and his clerks respectively to the business of the liquidation. In fixing the amount of the remuneration, the Judge will, subject as hereinafter mentioned, be guided by the following scale:—

LIQUIDATORS.

			£	Per day of eight hours. £
Group A.	Class 1.	Where the assets divisible among the unsecured creditors shall not amount to	500	1
	„ 2.	Where they shall amount to £500, and not to	2000	2
	„ 3.	Where they shall amount to £2000, and not to	5000	3
Group B.	„ 4.	Where they shall amount to £5000, and not to	10,000	4
	„ 5.	Where they shall amount to £10,000, and not to	50,000	6
Group C.	„ 6.	Where they shall amount to £50,000, and not to	100,000	8
	„ 7.	Where they shall amount to £100,000, and not to	500,000	10
	„ 8.	Where they shall amount to over ..	500,000	12

CLERKS.

	1st Class. s.	1st Class. d.	2nd Class. s.	2nd Class. d.	3rd Class. s.	
Group A.	2	0	1	6	1	per hour.
„ B.	3	0	2	6	1	„
„ C.	3	6	2	6	1	„

"If in the special circumstances of any liquidation it shall at any time, or from time to time, appear to the Judge that it is proper to place it on a higher or lower class, he will so place it accordingly.

"If it shall appear to the Judge that in the special circumstances of any liquidation it is proper to add to or deduct from the amount of remuneration provided by the scale, he will make such addition or deduction accordingly. If during the progress of a liquidation it shall appear to the Judge expedient so to do, he will sanction payments to the liquidator on account of his remuneration.

"For this purpose the Judge will estimate the amount of such remuneration as well as circumstances will admit, and will pay to the liquidator either the whole of such estimated remuneration, or such part thereof as to the Judge shall seem reasonable."

The effect of the arguments sufficiently appears from the judgment, and from the summary of the affidavits given in the statement.

Dec. 14. SIR G. M. GIFFARD, V.C.:—

I have to determine in this case the amount of remuneration to which Mr. *Cannan* is entitled, as having been the liquidator of the *Agra & Masterman's Bank, Limited.* The head office of the bank when it stopped in June, 1866, was in *Nicholas Lane, London*, it had branches and agencies at five different places in the *East Indies;* at *Hong Kong* and *Shanghai* in *China;* and at *Sydney* and *Melbourne* in *Australia;* as well as at *Edinburgh*, I believe, and *Paris.* Its debts and credits were to be reckoned by millions, its creditors by thousands. The amount of assets collected by the liquidator was about £3,700,000, a dividend of 5*s.* in the pound was paid by the liquidator in September, 1866, this amounted to £1,800,000, and he would have paid another dividend of 6*s.* 8*d.* in the pound in January, 1867, but for the order made by the Court approving of an arrangement for the resuscitation of the bank.

The winding-up was a voluntary winding-up under the supervision of the Court. It was conducted principally by Mr. *Cannan*, but he had the assistance of his partners, and of a confidential clerk of his and theirs named *Gardiner;* the clerks of his firm were also engaged in the matter, and there were retained and engaged in this country several of the bank clerks, and abroad, with the approval of the Court, several of the bank clerks and agents. Mr. *Barnes* was also employed to act for Mr. *Cannan* abroad. The salaries of the bank clerks in this country, and of the bank clerks and agents abroad, including Mr. *Barnes,* were paid out of the assets of the company. The clerks in this country were dismissed soon after the stoppage on the usual three months' notice and payment. This course was adopted in the cases of those who were re-employed as well as in the cases of those whose services were entirely dispensed with.

The liquidation was conducted with care, attention, judgment, and diligence. The liquidator lent money on the security of consols, and invested largely in consols. They rose in value; there was a considerable profit, of which the bank had the benefit, owing principally, first, to the rise in the value of consols; secondly, to the rise in the price of cotton, the liquidator having realized favourably; and, thirdly, to the rise in the value of Egyptian bonds; the cotton and bonds being held by the liquidator for some months.

An arrangement might have been come to as to the liquidator's remuneration when he was appointed; this was not done, nor do I find before or during the liquidation any trace of any mention by or to the liquidator of any arrangement or agreement as to the basis or principle on which he should be remunerated. The 93rd section of the *Companies Act*, 1862, speaks of the Court giving a remuneration by way of percentage or otherwise. Mr. *Cannan* claims £25,000, and says that that sum does not amount to more than 12*s.* 6*d.* per cent. on the moneys realized and received during his liquidation.

There has been no decision in any contested case which throws any light upon the subject; but it has been much considered, and in May, 1868, after the date of the transactions with which I have to deal, an order was approved by the Lord Chancellor, and adopted by the Master of the Rolls and the Vice-Chancellors, laying down the principles on which, and the mode in which, a liquidator's remuneration ought to be adjusted, taking as its basis, according to a given scale, first, the amount of assets divisible among the unsecured creditors; and, secondly, the number of hours devoted to the business by the liquidator and by his clerks respectively, dividing the clerks employed into classes, and then, in the special circumstances of any liquidation, leaving it to the Judge, if he thinks proper, to add to or deduct from the amount of remuneration provided by the scale.

In this state of things, and before going further, I may observe that three ingredients were referred to as being (amongst others) proper to be taken into consideration in settling the liquidator's remuneration, no one of which ought, in my opinion, to be adopted. These are, first, percentage; secondly, profits made by investing and realizing the assets; thirdly, the time of the clerks and others who had been in the service of the bank, and who were re-employed, or whose services were retained, and all of whom were paid out of the assets of the bank.

First: Payment by percentage is not and never was imperative on the Court. The liquidator never had a right to expect that he would be paid by percentage, and it is a mode of remuneration which, having regard to the circumstances under which this bank stopped, and the nature and enormous amount of the assets and dividends, is not admissible.

Secondly: if the remuneration is to be increased simply because there have been profits, there ought to have been a diminution if there had been losses. It so happened that prices and the markets rose. Adverse prices and markets, if such had been the result, would have caused much greater anxiety and labour to the liquidator than favourable ones. Neither rise nor depression need or could be in any way legitimately caused by him, and if the time and labour expended ought to be the main ingredients to be taken into consideration, as I think they ought, it follows that the profits ought not.

Thirdly: As to the time of the bank clerks and others; this question ought not to be and cannot be in any way affected by the dismissal, and payment for dismissal, and re-employment at salaries to be paid out of the assets of the bank. It was felt to be impossible to claim anything for the bank clerks and others employed abroad, yet there is just as much reason for making a claim for their time as for making a claim for the time of those who were in *England*. Both the order referred to and the reason of the thing apply plainly to the time of the liquidator and his clerks, or the clerks of his firm, of whose services his other business is for the time deprived, and not to those who were paid, not by him but out of the assets of the bank, and who were exclusively the bank's clerks and servants.

This disposes of the claim based on percentage, the claim as depending on profits, and the claim for the bank clerks' time. I may dispose in the same way of what is alleged by the committee of shareholders in their affidavit of the 14th of June, 1867. They there say that the liquidation may be divided into three periods—

(1.) From the stoppage of the bank on the 7th of June, 1866, to the 18th of October, 1866, the date of the meeting of shareholders when the resuscitation arrangements were unanimously approved of.

(2.) From the 18th of October, 1866, to the 11th of January,

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1867, when possession of the assets was handed over by the liquidator to the *Agra Bank, Limited,* under the resuscitation agreement.

(3.) Subsequently to the 11th of January, 1867.

And they suggest that the rate of remuneration should be less during the second period than the first, and during the third period than the second. No valid reasons for any such difference have been brought forward. Mr. *Cannan's* time and labour and that of his clerks was just as valuable at the one time as at the others, and I am unable to arrive at any fair *criteria* which I can justly apply to the estimation of Mr. *Cannan's* remuneration, excepting those mentioned in the Order of May, 1868. These his counsel did not at the Bar adopt, but it is worthy of observation that they were unable to suggest, and did not suggest, any theory or scheme of their own or his, and in substance threw on the Court the whole *onus* of arriving at a conclusion on such grounds as it might think just and reasonable. In saying this I do not omit to recollect that the £25,000, the amount of the claim, appears to be calculated, at all events in some measure, on the amount of moneys realized during the liquidation; nor, in adopting and applying the *criteria* mentioned in the Order of May, 1868, do I forget the date of the Order as compared with the dates of the transactions with which I have to deal, or the provision "that if it shall appear to the Judge that in the special circumstances of any liquidation it is proper to add to or deduct from the amount of remuneration provided by the scale, he will make such addition or reduction accordingly," and therefore it is that I take the number of hours employed from the evidence before me, and, though asked to do so, decline to direct any further inquiry on the subject, though I probably should have done so if the Order of May, 1868, had been of an earlier date.

From the evidence it appears that between the 8th of June, 1866, and the 31st of January, 1867, the services of the liquidator, his partners and clerks, were as follows:—

(1.) Mr. *Cannan* and his partners . . .	3,377	hours.
(2.) Mr. *Gardiner,* his confidential clerk .	1,763	,,
(3.) General clerks	11,254	,,

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And from the 31st of January, 1867, to the 30th of May, 1868 :—

Mr. *Cannan* was employed	725 hours.
And his clerks	4835 „

Mr. *Cannan* states that there is due to his solicitors for costs about £8000; these costs will, of course, be properly investigated and provided for by the bank. I do not understand that they enter into the amount of the claim.

The amount of remuneration has been taken into consideration by the directors of the bank, and by them submitted to the shareholders. The directors suggested that £7000 was a proper sum to offer by way of remuneration, the shareholders declined to offer more than £5000. It appears from the evidence that the salary of the directors was £5700 a year; the salary of the *London* manager and secretary £5600. If I take the time of the liquidator and his partners and clerks as follows, viz. :—

	£	s.	d.	£	s.	d.
Liquidator and partners, the highest scale in the order :						
3377 hours at 30*s.* = . . .	5065	10	0			
725 „ = . . .	1087	10	0			
				6153	0	0
Gardiner :						
1763 hours at 3*s.* 6*d.* = ...				308	10	6
Clerks, 11,254 hours :						
$\frac{2}{3}$ = 7502 $\frac{2}{3}$ hours at 2*s.* 6*d.* =	937	16	8			
$\frac{1}{3}$ = 3751 $\frac{1}{3}$ „ 1*s.* . =	187	11	4			
				1125	8	0
Clerks, 4835 hours :						
$\frac{2}{3}$ = 3223 $\frac{1}{3}$ hours at 2*s.* 6*d.* =	402	18	4			
$\frac{1}{3}$ = 1611 $\frac{2}{3}$ „ 1*s.* . =	80	11	8			
				483	10	0
The result is				£8070	8	6

I have already stated that the liquidation was conducted with care, judgment, and diligence. Mr. *Cannan's* conduct, as might have been expected, was in every respect what it ought to have been: his duties were onerous, the amounts he had to deal with exceptionally large, and though I think his claim much beyond what I can allow, I do not forget that he was willing to refer it to

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an impartial person. Therefore, regard being had to all the circumstances I have mentioned, the date of the Order of May, 1868, as compared with those of the transactions referred to, and the liberty given by the Order to add to the amount of remuneration provided by the scale, I consider myself justified in arriving at the sum of £8070, as I have done, and in making the total amount up to £9000, to which will be added Mr. *Cannan's* costs and expenses of making out his claim. This, under the circumstances, together with the costs and expenses, is a fair, and, I may add, a liberal sum to allow, and more, probably, than will be allowed in cases happening subsequently to the Order I have referred to.

Solicitors: Messrs. *Ashurst, Morris, & Co.*; Messrs. *Uptons, Johnson, & Upton.*

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SCOTT *v.* RAYMENT.

Contract for Partnership—Specific Performance—Demurrer allowed—Cairns' Act—Damages.

As a general rule, the Court will not decree specific performance of a contract for partnership.

Where the Plaintiff's appropriate remedy is an action at law, where there are no legal difficulties in his way which the Court can remove, and where there has been no part performance, the Court will not decree specific performance of a contract for partnership.

In a case in which, before *Lord Cairns' Act*, the Court would not have interfered, it will not, since that Act, assess damages.

DEMURRER.

The bill was filed by *Gabriel Scott*, stating as follows:—

The Plaintiff, a manufacturer of chemical manures at *Redbridge*, in *Hampshire*, being desirous of finding a partner in business, in February, 1868, received a letter from *Thomas Horsey*, of the firm of *Fuller & Horsey*, auctioneers and estate agents, recommending the Defendant, *Edward Drury Rayment*, to him as a partner. A correspondence took place, and the Defendant visited and inspected the Plaintiff's manufactory.

On the 9th of March, 1868, the Plaintiff handed to *Thomas Horsey*, on behalf of the Defendant, a paper entitled "*G. Scott's*

Propositions," embodying the terms on which he was disposed to accept the Defendant as a partner; and on the 14th, the Defendant wrote to the Plaintiff, stating that *Horsey* had handed to him the proposals, and making some objections thereto in points of detail.

Further correspondence followed, and ultimately, on the 23rd of March, 1868, the Plaintiff and Defendant met and discussed the proposals. The Defendant required some alterations to be made, to which the Plaintiff assented, and the paper of proposals was altered in accordance with the agreement, and as so altered was signed by the Plaintiff and handed to the Defendant, and a duplicate copy at the same time signed by the Defendant and handed to the Plaintiff.

This document was headed "Propositions for partnership between Mr. *G. Scott* and Mr. *E. D. Rayment*, discussed March 23rd, 1868." It proceeded as follows:—"The partnership to commence 1st of August, 1868, and to be carried on under the style or firm of *G. Scott & Co.*, Mr. *Rayment* paying down at once a deposit of £2000 against the amount to be shewn by *G. Scott* on 1st August, 1868, on which day Mr. *Rayment* to pay into the partnership the balance (after deducting the £2000 advanced), equal to the sum then shewn by *G. Scott* in buildings, plant, implements, and stock-in-trade; *G. Scott* agreeing to take to his own book debts and pay off all his liabilities up to the day of the partnership, August 1st, 1868. Mr. *Rayment* to pay *G. Scott* the sum of £500 as goodwill for a moiety of the profits of business during a partnership of ten or twelve years, to be paid as follows" (specifying instalments of £100 a year); "*G. Scott* to be allowed out of the business as a charge against trading account by the partnership the sum of £300 per annum for his extra services and management, after which each partner to be credited with 5 per cent. interest for his capital, and the profits to be then divided in equal proportions. Mr. *Rayment* covenanting to put into the business further sums up to £5000 (beyond the amount invested August 1st, 1868, equal to *G. Scott's* capital), to be advanced at the rate of not less than £2000 per annum;" on which extra capital he was to receive £6 per cent. interest before division of profits, with other minor provisions.

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On the 2nd of June, 1868, the Defendant wrote to the Plaintiff to say he had sustained some heavy losses, and at a meeting with the Plaintiff on the 4th of June, he refused to perform the contract.

The bill prayed that the Defendant might be decreed specifically to perform the contract; for a declaration that the Plaintiff was entitled to damages; for an inquiry as to the amount; and that the Defendant might be decreed to pay the amount found due.

The Defendant demurred.

Mr. *Kay*, Q.C., and Mr. *Martineau*, for the demurrer:—

We rely on the general rule, that Courts of Equity will not decree specific performance of an agreement for a partnership: *Lindley* on Partnership (1), upon the authorities there cited, and for the reasons there given.

Moreover, the period for which the partnership is to last is left uncertain, "ten or twelve years," and the contract is, in this particular, too vague to be enforced: *Sichel* v. *Mosenthal* (2).

Mr. *W. M. James*, Q.C., and Mr. *A. E. Miller*, for the bill:—

In *England* v. *Curling* (3) the Court enforced an agreement for a partnership.

The alternative of "ten or twelve years" means ten or twelve years at the option of the Defendant. That which can be ascertained is always considered as certain; and the term being certain, the general rule is, that the Court will execute a contract for partnership: *Fry* on Specific Performance (4).

The authorities are: *Anonymous* (5); *Hibbert* v. *Hibbert* (6); *Hercy* v. *Birch* (7); *Maddock's* Chancery Practice (8).

In *Stocker* v. *Wedderburn* (9) the demurrer was allowed; but the report shews that not even certainty in the term is an absolute essential to the exercise of the jurisdiction.

All that was decided in *Sichel* v. *Mosenthal* was, that if *England* v. *Curling* had been different, the Court would not have decided the case as it did.

(1) 2nd Ed. p. 947.
(2) 30 Beav. 371. 8 Jur NS 275
(3) 8 Ibid. 129.
(4) Page 407.
(5) 2 Ves. Sen. 630.
(6) Coll. on Partnership, p. 133.
(7) 9 Ves. 357.
(8) 3rd. Ed. vol. ii. p. 525, note (*l*).
(9) 3 K. & J. 393.

Supposing the Court to have jurisdiction, there is now power under *Lord Cairns' Act* to assess damages without sending the parties to law.

Sir G. M. Giffard, V.C. :—

I think this demurrer must be allowed.

In the first place, I do not hesitate to say, that as a general rule the Court will not decree specific performance of an agreement to perform and carry on a partnership. There may be exceptions, but very limited exceptions, to that rule, such, for instance, as the Court going the length of decreeing the execution of a deed.

Three cases have been cited. I think the one quoted from *Vesey* (1), the anonymous one, we may pass over, for I cannot take that to be an authority for saying that this Court will decree the carrying into effect of a partnership; and we will go to *England* v. *Curling* (2), and *Hibbert* v. *Hibbert* (3). In both those cases there had been part performance, and I do not at all hesitate to say, that in both it was essential to the ends of justice that the *status* of the parties should be ascertained, determined, and fixed; and especially in *England* v. *Curling* is that manifest, when one finds that there was a direction to ascertain, in substance, what the agreement between the parties was.

What we have here is an agreement which, I admit, upon the allegations in this bill must be taken as a binding agreement. I do not think it necessary for me to say whether the agreement is uncertain or not, or whether Mr. *James'* is or is not a correct interpretation of the stipulation as to ten or twelve years. But this is clear, that it is an agreement to form a partnership, and if so, it is an agreement on which the Plaintiff may maintain an action at law for damages, and that is an appropriate remedy. Nothing has happened to throw any legal difficulties in the Plaintiff's way which this Court could remove, such, for instance, as occurs in those cases where there has been an agreement for a lease and possession; and where if a lease is executed it requires to be antedated, in order to do justice between the parties.

This is a case in which, before *Lord Cairns' Act*, this Court

(1) 2 Ves. Sen. 630.
(2) 8 Beav. 129.
(3) Coll. on Partnership, p. 133.

would not have interfered. If this Court would not have interfered antecedently to *Lord Cairns' Act*, it will not interfere now, on the mere possibility that the Plaintiff may be entitled to some damages, which by bringing the action he may be able to recover in a Court of Law.

Therefore, on these grounds the demurrer must be allowed, and the bill must be dismissed; but as the Plaintiff desires it, though I believe it is not necessary, the order will be without prejudice to his legal right. The costs will follow the result.

Solicitor for the Plaintiff: Mr. *John Henry Jones.*

Solicitors for the Defendant: Messrs. *Cunliffe & Beaumont.*

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FLANAGAN *v.* GREAT WESTERN RAILWAY COMPANY.

Specific Performance—Lease—Contract by Director.

In 1840 a railway company entered into an agreement under seal to grant *A.* a lease for ninety-nine years of the hotel to be erected at *X.* station, with power for the company to determine the lease if any complaint as to the mode of carrying on the business should not be remedied within three months after notice of such complaint. It was also agreed that the lessees "should have the occupation of the refreshment rooms at *X.* station, subject to the same restrictions and provisions as relate to the carrying on the business of the hotel, both as regards the quality and prices of provisions, and management thereof." The lease granted in pursuance of this agreement was confined to the hotel, and contained no mention of the refreshment rooms.

The refreshment rooms on the up line adjoining the hotel had been always occupied with it. In 1849 *B.*, a director of the company (head of a firm at *X.*, who were assignees of the lease of the hotel), erected at a cost of £200 refreshment rooms on the down line pursuant to an alleged agreement with the company that his firm should have a lease of such refreshment rooms for a term co-extensive with the lease of the hotel. The only evidence of such agreement was this minute in the books of the company: "A ground rent of £6 per annum was ordered to be fixed for the new refreshment rooms built by the lessees at the down station in *X.*"

In 1867 the company gave notice to *C.*, the assignee from *B.* of the lease and occupier of both refreshment rooms, that their arrangements with reference to a new station (recently erected) at *X.* would involve the determination of his tenancy of the existing refreshment rooms:—

Held, 1. As to the refreshment rooms on the down line, that no agreement of which the specific performance could be granted was proved, and that in any case the Court could not enforce specific performance of an agreement by a director with the company for the benefit of himself or his firm. 2. As to the upper refreshment rooms, that the occupation was not determinable at the mere will of the company, and that *C.* was entitled to have the agreement of 1840 carried into effect by having a deed executed to him as the assign of *A.*, with all proper provisions, granting the right of occupation of the upper refreshment rooms to him his assigns and nominees, being tenants of the hotel, subject to the provisions and restrictions contained in the agreement.

THIS was a bill by the assignee of the lease of the *Great Western Hotel* at *Reading*, for the purpose of establishing his claim to a lease of the refreshment rooms at that station for a term co-extensive with that for which the lease of the hotel was granted. The *Reading Station* is divided into two parts, viz. the lower station, at which trains on the down line stop, and the upper station for trains on the up line. There are refreshment rooms at both the upper and lower stations, and the Plaintiff had been in the occupation of them, together with the hotel, since an assignment of the lease of the hotel made to him in 1860.

By an agreement under the common seal of the company, dated the 16th of March, 1840, and made between the *Great Western Railway Company* and Messrs. *Grissell & Peto*, builders, it was agreed that certain land adjoining the *Reading Station* and the buildings to be erected thereon should be let by the company to *Grissell & Peto*, their executors, administrators, and assigns, for the term of ninety-nine years from the 25th of March, 1840, at the yearly rent of £20, and that *Grissell & Peto*, their executors or administrators, should, under the inspection and to the satisfaction of the company's surveyor, erect upon the demised land a messuage adapted to the business of an hotel and tavern, and finish the same by the 25th of March, 1841. As soon as the hotel should have been erected and completed to the certified satisfaction of the company's surveyor, the company would, on the request and at the expense of *Grissell & Peto*, their executors or administrators, execute and grant to them, or to their nominee or nominees, a lease of the ground thereby agreed to be demised, and of the hotel and other buildings to be erected thereon, for the term of ninety-nine years. Every lease to be granted pursuant to this agreement was to contain covenants on the part of the lessees for payment of rent and taxes, to repair and insure, and not to carry on any trade or business on the demised premises other than that of an hotel or tavern keeper and any business incidental thereto, with a proviso for re-entry on the breach or non-performance of the covenants. In addition to such proviso for re-entry, it was provided that the lease should contain a proviso that "if at any time during the said term the business of an hotel and tavern keeper shall not be carried on upon the said premises, or if the same shall not be carried on, managed, or conducted to the satisfaction in all respects of the chairman and deputy-chairman for the time being of the *London* board of directors of the company, then and in such case it shall be lawful for the company by notice in writing under their corporate seal, or under the hands of three or more of the directors, to be delivered or left on the said premises, of such default or mismanagement which they, the said chairman and deputy-chairman, may consider to have arisen, and if the same be not remedied within three months from the date of such notice, that then the *London* board of directors shall have the power wholly to determine and put an end to the said lease, and that the said lease and the term thereby granted shall thereupon, from and after the expiration of such notice, cease, determine, and be void to all intents and purposes whatsoever, save and except as to any covenant on the part of the lessees which may have been previously broken."

In the event of the lease being so determined, the value of the building was to be fixed by arbitration, and paid by the company to *Grissell & Peto*, their nominees or nominee, executors, administrators, or assigns. Covenants on the part of the company for quiet enjoyment on payment of rent and performance of the covenants by *Grissell & Peto*, or their nominees or nominee, and their or his executors, administrators, and assigns, were to be contained in the lease, and *Grissell & Peto* were to pay all expenses of the preparation and execution of the lease and the charges of the surveyor or architect. "And it is further agreed between the said parties that the said *Thomas Grissell & S. M. Peto* shall have the occupation of the refreshment rooms at the *Reading Station* subject to the same restrictions and provisions as relate to the carrying on the business of the hotel, both as regards the quality and prices of provisions and management thereof;" and finally, any difference as to the construction of the agreement was to be referred to the final decision of *Philip Hardwick* (the surveyor of the company).

The hotel was built by *Grissell & Peto*, and on the 21st of September, 1842, a lease thereof for ninety-nine years was granted to them by the company. This lease, together with all the estate and interest of the original lessees of and in the refreshment rooms at the *Reading Station*, was, before 1849, assigned to *Simonds & Co.*, of *Reading*, for value, and was now vested in the Plaintiff by assignment from them.

With regard to the lower refreshment rooms, it appeared that Mr. *Simonds* (of the firm of *Simonds & Co.*) had, in 1849, being then a director of the company, erected, at a cost of £200, these lower refreshment rooms, pursuant (as alleged on behalf of Plaintiff) to an agreement with the company that his firm should have a lease of such refreshment rooms, when erected, at the yearly rent of £6, for a term co-extensive with that for which the hotel and the upper refreshment rooms were then held.

The following minute, dated the 6th of December, 1849, appeared in the books of the company in reference to this transaction:—"A ground rent of £6 per annum was ordered to be fixed for the new refreshment rooms built by the lessees at the down station in *Reading*."

By indentures dated the 19th of November, 1860, the hotel and other demised premises, and "all and whatsoever the estate and interest of them (Messrs. *Simonds*) of and in the refreshment rooms at the upper and lower stations of the *Great Western Railway* at *Reading*, under and by virtue of the agreement of the 16th of March, 1840, the assignment to Messrs. *Simonds*, and of the minute of the 6th of December, 1849, or otherwise howsoever," were assigned for value to Plaintiff, who had ever since been in possession and occupation of the hotel and the two refreshment rooms.

The company had recently erected a new and enlarged station at *Reading*, including new refreshment rooms; and, by a letter dated the 1st of November, 1867, they gave Plaintiff notice that their arrangements with respect to the new station would involve the determination of his tenancy of the existing refreshment

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rooms. Advertisements were, in January last, issued by the company for tenders for the occupation of these new refreshment rooms.

Under these circumstances Plaintiff had filed his bill, praying a declaration that, by virtue of the articles of agreement of March, 1840, and the board minute of December, 1849, and under the circumstances, Plaintiff was entitled to a lease of the refreshment rooms at the *Reading* station of the *Great Western Railway Company* for a term co-extensive with that for which a lease of the hotel was granted by the company; and that Defendants might be decreed to execute a proper lease accordingly.

The bill also sought to restrain the Defendants from granting any lease of the refreshment rooms, or any part thereof, to any person other than Plaintiff; and likewise from permitting any person other than Plaintiff to occupy and use such refreshment rooms, or any of them.

Mr. *Druce*, Q.C., and Mr. *Kekewich*, for the Plaintiff:—

With respect to the upper refreshment rooms, we are clearly entitled, under the agreement of 1840, to a lease for a term coextensive with that for which the hotel is held. As to the lower refreshment rooms, £200 was expended by *Simonds* in building them on the faith of the agreement with the company that his firm should have a lease at £6 per annum. That agreement is evidenced by the minute in the books of the company, and the subject matter of the agreement being proper and necessary for the purposes for which the company was incorporated, it is enforceable, though not under the seal of the company: *South of Ireland Colliery Company* v. *Waddle* (1). In any case, no proper notice has been given by the company for the purpose of determining the agreement; and the Court will not assist a fraud by allowing the company to turn the Plaintiff out of possession of the lower station after £200 has been expended on the faith of the agreement with the company. [The relief asked with respect to the new refreshment rooms was not pressed.]

Mr. *Kay*, Q.C., and Mr. *Wickens*, for the Defendants:—

The original agreement contains no clause which can have the effect relied upon by the Plaintiff, or such as to enable the Court to direct the execution of a lease for a term co-extensive with that for which the hotel was demised.

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(1) Law Rep. 3 C. P. 463.

[The VICE-CHANCELLOR:—Suppose, putting aside the word "term," the company had granted the right to occupy the refreshment rooms, with a stipulation that the company might determine such occupation, if it was not carried on to their satisfaction, at three months' notice, could the company determine the occupation in any other way?]

The bill does not allege any right in the Plaintiffs as licensees, but simply as tenants. We say they had merely the first option or refusal of occupying the refreshment rooms given to them by the agreement, and that option can be at any time determined by the company.

[Upon the question whether a license under seal would be revokable: *Wood* v. *Leadbitter* (1), *Frogley* v. *Earl Lovelace* (2), and *Gale* on Easements, were referred to.]

As to the lower refreshment rooms, there is no agreement binding under the *Statute of Frauds* of which the Court can direct specific performance. The memorandum on which the Plaintiff relies mentions no term, but merely that a ground rent of £6 per annum is to be paid. But even if there were an agreement under the seal of the company, precise and definite in terms, the Plaintiff can claim no higher rights than those of his assignors, and *Simonds* being a director at the time of the alleged agreement was thereby (either by himself, or by the firm of which he was a partner) precluded, both by special and general enactment and by express decision, from entering into any contract for his own benefit or that of his firm in relation to the affairs of the company: *Aberdeen Railway Company* v. *Blakie* (3); *The Companies Clauses Act* (8 Vict. c. 16), ss. 88, 89; 5 & 6 Will. 4, c. cvii. s. 132 (*Great Western Railway Act*) (4). In any case, it would be a most un-

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(1) 13 M. & W. 838.

(2) Joh. 333.

(3) 1 Macq. 461.

(4) This section provides that no director shall be "capable of accepting any other office or place of trust or profit under the company, or of being concerned or interested in any contract with the company, during the time he shall be director of the company; and if any director of the company shall, at any time subsequently to his election,

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reasonable construction to hold the company bound as to the refreshment rooms for a period of ninety-nine years, so as to preclude themselves from making any alteration or determining the tenancy.

Mr. *Druce*, in reply:—

As to the preposterous nature of the arrangement, the *Swindon* refreshment rooms were also demised for a term of ninety-nine years, and at a nominal rent, in consideration of the expenses incurred in their erection. This appears from *Rigby* v. *Great Western Railway Company* (1), which was a suit to restrain the company from running express trains without stopping at *Swindon* station for refreshment, pursuant to a covenant with the lessee. Assuming that Plaintiff is in the position of a mere licensee, the company, under the agreement of March, 1840, cannot determine the license for the refreshment rooms without also determining the occupation of the hotel, and the mode prescribed by the agreement has not been complied with. The rule against dealings by directors with the company does not apply where the contract is made at arm's length, and not procured by the influence and vote of the director at the board. Sect. 132 of the *Great Western Railway Act* does not render such a contract void, but merely disqualifies the director who has entered into it.

SIR G. M. GIFFARD, V.C.:—

The bill undoubtedly goes to the new refreshment rooms as well as the old, but, very properly, any relief as to the new refreshment rooms was waived, and therefore, as to that, the bill must undoubtedly be dismissed.

As to the lower refreshment rooms, the case is, I think, plain. First of all, the main evidence brought forward is a minute which does not contain in itself sufficient terms for this Court to act

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accept or continue to hold any other office or place of trust or profit under the company, or shall either directly or indirectly be concerned in any contract with the company, or shall participate in any manner in any work to be done for the company . . . the office of such director shall thereupon become vacant, and he shall thenceforth be disqualified from voting or acting as a director."

(1) 15 L. J. (Ch.) 266.

upon, or, in fact, the complete terms of the agreement. In addition, we have the affidavit of Mr. *Simonds*, in which he states that he was a director at the time when it was agreed between his firm and the company that if his firm erected at their own expense a refreshment room at the lower station, they should have a lease thereof at £6 a year for a term co-extensive with that for which *Grissell & Peto* held the hotel and upper refreshment rooms. In my opinion, whatever the rights may be with reference to the upper refreshment rooms, they certainly were not the rights of tenants. That, of course, would throw great difficulty in the way of specifically performing any agreement, even although this outlay of £200 was made after the agreement was entered into. But it must be remembered that this outlay was by *Simonds*, or by *Simonds* and his firm; that the Plaintiff had nothing to do with the matter until long after *Simonds'* outlay, and that he is here to enforce the agreement which *Simonds* entered into with the company, and is therefore in the same situation as if *Simonds*, as Plaintiff, were seeking to enforce this agreement. I have no hesitation in saying that *Simonds*, having been at the date of the agreement a director of the company—whether we look to sect. 132 of the special Act or to the *Aberdeen Railway Company* v. *Blakie* (1)—he could not come here to have an agreement of that description enforced. As to that part of the case, therefore, the bill must clearly be dismissed.

The two remaining points are, whether upon this bill I could, if so disposed, direct a license to be executed under seal, and then whether or not a license executed under seal, and containing what I conceive to be the true effect of the last part of the agreement, would be revocable. Upon that part of the case I must take time to consider the matter; but this much is perfectly clear, that *Grissell & Peto*, beyond question, never contracted to become lessees, and the company could never have compelled them to occupy. It can be, at the most, only a license; and before I dispose of that part of the case I should like, first of all, to read through the bill to see whether I can do anything on the face of it, and then to see what the effect of a license in those terms under the seal of the company would be.

(1) 1 Macq. 461.

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Nov. 14. Sir G. M. Giffard, V.C.:—

At the end of the argument in this case I dismissed, with costs, so much of the bill as relates to the new refreshment rooms and to the lower refreshment rooms, but I reserved my judgment as to the upper refreshment rooms, not being satisfied at that time as to what the effect of the agreement of the 16th of March, 1840, may be so far as it relates to the upper refreshment rooms. Those refreshment rooms existed at its date, and the agreement applies to no other. There has been possession of these refreshment rooms under the agreement in connection with the hotel for, I believe, twenty-nine years. The agreement in question is under the seal of the company, but is nevertheless an executory agreement in every part of it. In 1842 a lease of the hotel, pursuant to the first part of the agreement, was granted. That lease does not in any way refer to the refreshment rooms. That fact, however, in my opinion, is no reason why relief should be refused to the Plaintiff, or why, if a deed ought to be executed under the last part of the agreement with reference to the refreshment rooms, it should not now be so executed. It was argued that the provision as to the refreshment rooms was confined to Messrs. *Grissell & Peto* personally, and that, in point of fact, it merely gave them an occupation, which the company could terminate at any time, or, as was said, that Messrs. *Grissell & Peto* were to have the first turn. This, in my opinion, is not the true effect and construction of the agreement. One consideration runs through the whole of the agreement, and applies to every part of it. The earlier part of the agreement, speaking in general terms, is an agreement to let the hotel for a definite period at a definite rent, and it is provided that the company, on certain things being done, shall grant to Messrs. *Grissell & Peto,* their executors, administrators, or their nominee or nominees, a lease, and then the covenants are specified into which the lessees are to enter, and there is this provision:—[His Honour read the provision giving the company power to determine the lease, in the event of mismanagement, if the same were not remedied within three months from the date of notice.] This extends to the conducting of the business by Messrs. *Grissell & Peto,* their assigns and nominees. The document then continues down to within a few lines of the end, and at the end is added the provision which has given rise to the difficulty in the case:—

"And it is further agreed between the said parties that the said *Thomas Grissell & S. M. Peto* shall have the occupation of the refreshment rooms at the *Reading Station* subject to the same restrictions and provisions as relate to the carrying on the business of the hotel, both as regards the quality and prices of provisions and management thereof."

The refreshment rooms are at some distance from the hotel. Now, as I have said, the agreement is, in my opinion, executory in every part. The whole must be fairly looked to; and if the whole be looked to, though I quite agree that the tenants of the hotel were not, in the technical sense, to be tenants of the refreshment rooms, I can have no doubt but that the tenancy of the hotel and the occupation of the refreshment rooms were intended to be connected; and though it certainly was not intended that the tenants of the hotel should be bound to occupy the refreshment rooms, it was, I think, intended that they should have the option of doing so. Has, then, the true construction of the last provision of the agreement, treating it as executory, this effect? In my opinion it has, for it incorporates these provisions; they extend to Messrs. *Grissell & Peto*, their assigns and nominees, and, looking to them, it cannot be that the occupation was to be terminated simply at the will of the company, for a notice of termination was to be given; nor can it be that *Grissell & Peto* were to be the only occupants, for the provisions extend to nominees and assigns. Who, then, were to be the occupants, as is necessarily to be inferred from the agreement? And to that question I answer, *Grissell & Peto*, their assigns and nominees, being tenants of the hotel under the lease. A deed granting an occupation in these terms would not be revocable at the mere option of the company. If such a deed had been executed at the date of the lease in 1842, the Plaintiffs could have sustained no proceedings in this Court; and though the bill asks a great deal more than this, and much that is different from this, I think there is enough on the pleadings to justify me in saying that the proper decree is to declare that the Plaintiffs are entitled to have the agreement carried into effect by having a deed executed to them, as assigns of *Grissell & Peto*, by the Defendants, with all proper provisions, granting the right of occupation of the upper refreshment rooms, by themselves and servants, to them their assigns and nominees, being tenants of the hotel under the lease, but subject to the restrictions and provisions in the agreement mentioned, and otherwise, as thereby provided, and that it should be referred to Chambers to settle a deed accordingly. Besides this, the Plaintiff ought not to be disturbed by proceedings at law or otherwise until such a deed as I have referred to has been settled and executed, and this should be provided for; beyond this the Plaintiff is entitled to no relief. Regard being had to the case made by the bill, I can give the Plaintiff no costs, and he must pay the costs of so much of the suit as I have dismissed. The deed must be at the Plaintiff's expense.

[His Honour added, that in dismissing the bill upon the other points he had not been satisfied that the agreement as to the lower refreshment rooms was proved; besides which, the fact that the agreement was entered into by a director was sufficient ground for refusing specific performance.]

Solicitors: Messrs. *Lake, Kendall, & Lake*; Messrs. *Young & Co.*

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Ch 688, 690
691a.
Eq 596/7,
D. 362

LYS *v.* LYS.

*Partition—Sale—*31 & 32 *Vict. c.* 40.

The 4th section of the *Partition Act*, 1868 (31 & 32 Vict. c. 40), is retrospective.

Accordingly in a partition suit instituted before the passing of the Act by the owners of two undivided fourths of the property and praying a sale, which was opposed by the owners of the remaining fourths:—

Held, that the *onus* was thrown upon the parties opposing, and in the absence of any sufficient cause shewn against it a sale was ordered.

THIS was a partition suit, filed in November, 1867, by an infant and another person interested in two undivided fourths of certain lands, praying alternatively, that if in the opinion of the Court a sale of the property in question would be beneficial to the infant Plaintiff, then that a sale might be directed.

The property was devised by the testator, *H. C. Lys*, to his widow for her life, and after her death unto and equally to be divided between all his children who should be living at his death, share and share alike, to vest in sons at twenty-one, and in daughters at that age or marriage.

Testator left four children; the Plaintiff, *F. D. Lys; Mary Isabella,* since deceased, the mother of the infant Plaintiff, *Mary Philippa Andrew;* and Defendants, *Henry Allen Lys,* and *Frances Ann,* wife of *F. R. Noble.*

The widow of testator died in September, 1866.

The bill was filed in November, 1867, and the Defendants, *H. A. Lys,* and Mr. and Mrs. *Noble,* who were occupying the house and a portion of the land, by their answer, filed in February, 1868, before the passing of the *Partition Act,* 1868 (31 & 32 Vict. c. 40), objected to a sale as not being for the advantage of any of the persons interested in the property except the infant Plaintiff.

The question was whether sect. 4 of 31 & 32 Vict. c. 40, was retrospective (1).

Mr. *Druce,* Q.C., and Mr. *Langworthy,* for the Plaintiffs, contended that the section was retrospective, and referred to *Smith* v. *Smith* (2), in which sect. 27 of the *Law of Property and Trustees Relief Amendment Act* (22 & 23 Vict. c. 35) was held to be retrospective. Consequently the Court had jurisdiction to direct a sale.

Mr. *Martineau,* for the Defendants, who opposed a sale.

Mr. *C. F. Randolph,* and Mr. *W. Brodrick,* for other parties.

The VICE-CHANCELLOR was of opinion that the section was retrospective, but that a sale ought not to be directed without giving the Defendants an opportunity of filing affidavits for the purpose of shewing that a sale would be injurious to them. The cause would stand over for this purpose until the 23rd instant.

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(1) "In a suit for partition where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested individually or collectively to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions."

(2) 1 Dr. & Sm. 384. 7 Jur NS - 652

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Nov. 23. An affidavit of the Defendants, *H. A. Lys,* and Mr. and Mrs. *Noble,* was now produced, in which they stated that in their judgment and opinion it was most undesirable to sell the property by public auction, inasmuch as such sale would not realize more than one-third of the true value of the property, and that its value would be better obtained by a decree of partition, when each of the other persons entitled to a share in the estate would sell off his share by public auction or private contract at such time as he thought it best for his interests.

Being entitled to a moiety of the property, the Defendants desired to retain their share of the estate, and did not wish to sell the same at the present time, and were strongly of opinion that if the Court directed a sale the same would be ruinous to their interests, and that, at this season of the year especially, it was most undesirable that the estate should be sold, having regard to the interests of the several persons entitled thereto.

Evidence was given in reply on behalf of the Plaintiffs, that the house was in very bad repair, and fast falling to decay, that the lands were poorly cultivated, and greatly deteriorated in value, that Defendants, who were in possession of the house and part of the land, declined to pay any rent, or come to any arrangement for letting the same, and that it would be much for the benefit of all parties interested that the property should be at once sold, without incurring the expense and delay necessarily attendant upon a decree for a partition, especially as the share of Defendant, *H. A. Lys,* was very heavily incumbered, and as good a price would be obtained now as in the summer or autumn.

The Vice-Chancellor said that the Act threw upon the parties opposing a sale the *onus* of shewing that it ought not to be directed, and no sufficient reason against a sale had in his opinion been adduced by the Defendants in their affidavit. A sale would therefore be directed.

Solicitor for Plaintiffs: Mr. *John Wilkinson,* agent for Messrs. *Moore, St. Barbe, & Moore, Lymington.*

Solicitors for Defendants: Messrs. *Emmets, Watson, & Emmet.*

Morris - See 18 W.R. 665. Inquire who are entitled to the property to which the suit relates & for what estates or int[illegible] & in what respective shares & proportions & whether they are respectively parties to the suit. - And inquiry as to settlements or as to incumbrances. - And it appearing to the Ct that by reason of the nature of the sd property a sale of the same & distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them & the plaintiffs by their Col requesting the Ct to direct a sale of the property & a distribution of the proceeds instead of a division order & decree that if it should appear that all persons who are interested in the property are before the Ct that the said property shall be sold &c

MARSHALL *v.* GLAMORGAN IRON AND COAL COMPANY.

V.-C. G.
1868
Nov. 13, 16, 24.

Company—Agreement with Shareholder to cancel his Shares—List of Contributories.

13 Ch 439
17 Ch D 80

By the articles of association of a limited company, it was provided that no contract entered into by the directors to which the assent of the company in general meeting should be given, should be afterwards impeached on any ground whatsoever.

In December, 1866, the directors entered into a contract with the Plaintiff, one of the terms of which was that the company would "forthwith" cancel all shares in the company then standing in the Plaintiff's name which were not fully paid up. The contract was assented to by the company in general meeting, and was largely part-performed, but the Plaintiff's shares were not cancelled on the 13th of February, 1867, when resolutions were passed for a voluntary winding-up, which was afterwards continued under supervision:—

Held, that the agreement for cancellation of the shares could not be impeached:

Held, further, that the Plaintiff's name ought not to be on the list of contributories in the character of a present member; and ordered accordingly, but without prejudice to any application that might be made to make him a contributory as having been a past member.

THIS was a bill for specific performance.

By an agreement dated the 7th of June, 1865, the Plaintiff *Charles Brownlow Marshall*, the lessee of iron and coal mines in *Glamorganshire*, agreed with certain persons who were about to form the *Glamorgan Iron and Coal Company, Limited*, to underlease the mines to the intended company, reserving certain royalties, and to make over to the intended company the plant and other mining property.

The company was duly incorporated in June, 1865. The objects were stated in the memorandum of association, and comprised the following:—

"10. The making and carrying into effect of arrangements with respect to the union of interests or amalgamation, either in whole or in part, with any other companies or persons carrying on similar business."

"12. The performance and doing of all such acts and things as the company deem necessary, incidental, or conducive to the above objects; and the doing of all things and the exercise of all powers contained in the articles of association of the company."

The nominal capital was declared to be £100,000 in 5000 shares of £20 each.

Amongst the articles of association were the following:—

"72. Subject to the restrictions herein contained, the board of directors shall have power to do all acts and things which they may consider proper or advantageous for accomplishing the objects and for carrying on the business of the company, and for this purpose they may, from time to time, and on such terms and conditions as they may think advisable, make and enter into such purchases, sales, leases, loans, contracts, and agreements, as they may think fit, and may, from time to time, carry out, vary, modify, or abandon such contracts or agreements.

"73. The powers so conferred upon and exercisable by the directors shall include, amongst others, the following: To carry out and complete an agreement dated the 7th day of June, 1865.

"74. No purchase, sale, contract, or agreement made or entered into by the directors, or act done by the directors, to which the assent of the company in general meeting shall be given, shall be afterwards impeached or objected to by reason that the same is not within or is opposed to the business and objects of the company, or that a dissolution of the company may be thereby rendered necessary, or on any other ground whatsoever."

By an agreement dated the 15th of July, 1865, and indorsed on the agreement of June, 1865, it was agreed, amongst other things, that the Plaintiff should take a transfer of 200 shares in the company; and this he subsequently did.

An underlease from the Plaintiff to the company was, in pursuance of the agreement of June, 1865, and reserving the royalties therein specified, executed on the 5th of August, 1865; and on the 11th of July, 1866, the company mortgaged the premises to *Stephen Phillips*, as trustee for *George Cannock* and *John Romanes*, two directors of the company, to secure £11,000 and interest.

The agreement which was the subject matter of this suit was executed on the 6th of December, 1866, and made between the Plaintiff of the first part, *Stephen Phillips* of the second part, *George Cannock* and *John Romanes* of the third part, and the company of the fourth part. The several parties thereby entered into a variety of covenants. Amongst other things, the company and *Phillips* agreed to execute to the Plaintiff, who agreed to accept, a surrender of the underlease of the 5th of August, 1865; and the Plaintiff agreed to grant to the company a fresh underlease at a fixed rent of £600 a year, redeemable on payment of £5000, and at the same royalties as were reserved by the Plaintiff's original lease, dated the 13th of July, 1864. It was provided also that the new lease should not contain any clause that in the event of the company being wound up, or being dissolved, the same should be void. The company also agreed as follows:—

9. "The Defendant company hereby release the Plaintiff, his executors, administrators, and assigns, from the performance on his part of all the stipulations of the said agreement of the 7th of June, 1864, in relation to a dividend of £10 per centum on the shares of the Defendant company, and other the provisions contained therein or in the said agreement of the 15th of July, 1865, and from all other claims and demands whatsoever except under the now stating agreement, and will also forthwith cancel all shares in the Defendant company now standing in the name of the Plaintiff upon which the full amount shall not have been paid up."

The Defendants *Cannock* and *Romanes* also agreed to enter into a bond to indemnify the Plaintiff against the performance on his part of all the stipulations contained in the agreement of June, 1865, and in the agreement of July, 1865, and also from and against all claims of the company against the Plaintiff as a member thereof, and from all claims of the members or creditors of the company, or otherwise in respect of the connection of the Plaintiff with the company, excepting claims under the then present agreement. The Defendants *Cannock* and *Romanes* also agreed by the same or a separate bond, at the Plaintiff's option, to guarantee to him the payment by the company of the rent and royalties. The Plaintiff then agreed "forthwith" to execute to the Defendant *George Cannock*, who should accept a transfer of, all fully paid-up shares in the company which the Plaintiff was then possessed of or entitled to; also of certain debentures; and of all claims and demands whatsoever of the Plaintiff in respect of the matters there-

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inbefore mentioned, except such as were conferred on him or implied by the then present indenture.

By another deed of the 6th of December, 1866, but executed subsequently to the above agreement, a further charge upon the premises comprised in the underlease of the 5th of August, 1865, and in the mortgage of the 11th of July, 1866, was created by the company in favour of *Phillips* as trustee for *Cannock* and *Romanes*.

This agreement was confirmed at two general meetings of the company of the 21st of January, and the 6th of February, 1867, and the following acts were done under it, before the 13th of February, 1867, on which day resolutions were passed for winding up the company voluntarily, pursuant to a previous notice sent out on the 6th of February.

The Plaintiff executed to the Defendant *George Cannock*, who accepted, transfers of the fully paid-up shares, and an assignment of the debentures in the agreement mentioned. He also satisfied the claim of one *William Radley Standish Motte*, by payment to him of £500; and he signed a notice to the *Rhymney Railway Company* to the effect that the Defendant *George Cannock* was entitled to a claim for compensation. The company paid to one *John C. Penfold* the amount of certain bills for £2160, with interest and expenses; and they delivered to the Plaintiff certain bills of exchange drawn by the Defendant *Romanes* upon, and accepted by, the Defendant *Cannock*, amounting in all to £5000. These bills had been honoured. Drafts of the instruments to be executed in pursuance of the agreement had been prepared by the Plaintiff's solicitor, and had been deposited by him with the solicitors of *Phillips, Cannock*, and *Romanes*.

On the 2nd of March, 1867, the voluntary winding-up was ordered to be continued under the supervision of the Court.

The liquidator, the Defendant *Michael Louisson Levey*, declining to complete the agreement of December, 1866, by executing the instruments of which the drafts had been sent as above stated, leave was given to the Plaintiff to file this bill.

Notice was also given to the Plaintiff about the same time to shew cause why he should not be settled on the list of contributories for the 200 shares.

On the 8th of July, 1867, a bill, to which the Plaintiff was not a party, was filed by *Phillips*, *Cannock*, and *Romanes*, against the company and the liquidator *Levey*, for foreclosure, and on the 30th of July, 1867, an order was made, in pursuance of which *Phillips* was let into possession of the premises.

The Plaintiff was on the 27th of August, 1867, settled on the list of contributories for the 200 shares, and on the 7th of October, 1867, he filed this bill against the company, the liquidator *Levey*, and Messrs. *Phillips*, *Cannock*, and *Romanes*, charging that the company had not cancelled the 200 shares, and praying that the company and last three Defendants might be decreed specifically to perform the agreement of the 6th of December, 1866, so far as the same remained unperformed, with consequential relief; and that the name of the Plaintiff might be removed from the list of contributories in respect of the shares.

On the 28th of January, 1868, the company and the liquidator filed their answer, disputing the validity of the winding-up resolutions, on grounds which it is unnecessary to state; stating that the shares were not cancelled, and submitting whether it was competent to the directors or the company to cancel the same.

Mr. *Druce*, Q.C., and Mr. *Solomon*, for the Plaintiff:—

The questions are:—1. Had the company power to enter into this agreement to cancel their shares? and 2. Must the Plaintiff's name be retained on the list of contributories as against creditors.

As to the first, we say, everything that was done was within the powers. It was an arrangement properly made for the beneficial purchase of the lease within clause 10 of the memorandum, and the 72nd, 73rd, and especially the 74th article of association, which last is conclusive. That alone would cure any defect arising from want of power, the resolutions having been passed.

Then, again, the agreement has been part-performed largely; and if a contract be good before, the case of *In re Trent and Humber Company* (1) shews that it is not affected by a winding-up.

At any rate the Plaintiff is entitled to indemnity.

As to the second point: if the contract be binding on the company, it is binding on the company's creditors. In *Oakes* v. *Turquand* (2), followed by *Kent* v. *Freehold Land Company* (3), it was not, as here, through default of the company that the shareholder's name was on the list at the date of the winding-up. This agreement was executed on the 6th of December, 1866; and the shares were to have been cancelled "forthwith." The circular notifying the winding-up was not issued until the 6th of February. By that time the shares ought to have been cancelled. No act was possible on the Plaintiff's part in order to carry out the cancellation; and it is not alleged that he was in any default.

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(1) Law Rep. 6 Eq. 396; L. C. 11 Nov. 1868. 3 W R 257, 17 W R 101.

(2) Law Rep. 2 H. L. 325.

(3) Ibid. 3 Ch. 493.

Mr. *Fry*, for the Defendants, *Phillips, Cannock,* and *Romanes*:—

In so far as the Defendants *Cannock* and *Romanes* are joined with the company, and no alternative relief is asked against us personally, we support the Plaintiff's case. We say that either the contract must be specifically performed *in toto,* or the bill must be dismissed as against us.

By the agreement the company released the Plaintiff from all claims and demands. That alone would have relieved him from all liability as contributory. It is therefore needless to press the question of whether or not there was a cancellation before the winding-up. Even before the *Common Law Procedure Act,* the Plaintiff would have been able to resist the legal execution of a *sci. fa.* on this ground alone.

The company here is the only party in default. If a man's name be on the register by the default of a third party, he is fixed; not so, if his name be there by the default of the company.

By the terms of the contract this cancellation of shares was part of the consideration. Part of the property, the lease, still remains an asset of the creditors. How could a creditors' representative come here and insist upon the benefits both of the lease and of the shares? The company, moreover, has had the benefit of the lease.

Mr. *Higgins*, for the company and the liquidator:—

First, there was no agreement binding on the company; secondly, if *intrà vires* it was not confirmed; thirdly, it was *ultrà vires;* fourthly, the circumstances attending it were such as to disentitle the Plaintiff to the relief which he asks; fifthly, as to the 200 shares, the bill is filed too late.

As to the third point: if it be in the power of directors to release any shareholder from his liability by cancelling his shares, of course they can release any number of shareholders; in fact, release and even cancel the whole of the capital.

The memorandum and articles, as they stand, do not authorize such a stipulation as this; no special resolution was passed to alter the articles.

Even if there had been a power of cancelling shares, it was the Plaintiff's duty to have seen that his shares were cancelled. He is too late in applying after the winding-up.

We do not allege fraud, though as against the directors we say the arrangement was unauthorized and improper. But if creditors are not to suffer, even in case of fraud, how is it possible for a Plaintiff to make a case against creditors better than that of fraud? It is clear that in no event are creditors to be damnified.

Mr. *Druce* in reply (on the last point only):—

The principle is, that if a man chooses to go into a company, and the consequence is that creditors deal with the company, he is not to be released. But here what was done was as binding on the creditors as upon anybody else. The Plaintiff was the vendor of this landed interest to the company, and the cancellation of these shares was part of the consideration.

Nov. 24. SIR G. M. GIFFARD, V.C., after stating the facts of the case, observed that no cross bill had been filed to impeach the agreement of December, 1866, that the winding-up must be taken to have commenced on the 13th of February, 1867, and that a decree had been made on the footing of the agreement. His Honour continued:—

Regard being had to these circumstances, and to the allegations in the answer and affidavit, I do not hesitate to say that unless the agreement is bad as being *ultrà vires,* no sufficient grounds are alleged for impeaching it. Moreover, whether there were or were not such meetings as were sufficient legally to effect an alteration in the articles of association, the agreement was in my opinion assented to in and by two general meetings of the company; for the meetings of the 21st of January and the 5th of February, 1867, were duly convened and held.

The questions, therefore, for consideration are, whether, under these circumstances, the agreement of the 6th of December, 1866, is *ultrà vires* in whole or in part, and if not *ultrà vires* as regards the 200 shares, then, whether the Plaintiff ought or ought not to be on the list of contributories in respect of them.

The agreement in question altered the terms of the original arrangement between the Plaintiff and the company. It altered the royalties in favour of the company, and put an end to the clause in the underlease of the 5th of August, 1855, to the effect that, in the event of the company being wound up, that underlease should be void. Amongst other provisions contained in it is the following:—[His Honour read article 9 of the agreement set out above.]

In my judgment no one can have read the memorandum and articles of association, and compared the agreement of December, 1866, with the previous arrangements, and reasonably entertain a doubt as to any part of it being *intrà vires*, excepting that which provides for the cancellation of the shares standing in the Plaintiff's name. That part of the agreement is fairly open to discussion; but while it must be admitted, on the one hand, that the ordinary powers usually conferred on directors and meetings of shareholders do not authorize the cancellation of shares, it must be equally admitted on the other, that provisions for the forfeiture of shares are usual, and, if duly and *bonâ fide* called into operation, perfectly legal. The same also must necessarily be the result and effect of provisions for the cancellation of shares, if provisions there be which authorize anything of the kind.

Is, then, the cancellation of shares authorized by the memorandum of association and articles? To this question I should have great difficulty in giving an affirmative answer, if there were no such thing as the 74th article; but when I take into consideration the 10th and 12th paragraphs of the memorandum of association, add to those the 72nd and 73rd of the articles of association, and then bear in mind that the 74th of the articles is this:—[His Honour read the article:—] I am at once led to ask what reason can there be for so limiting the effect of this article as to exclude from its operation that part of the contract of December, 1866, which has to do with the cancellation of shares. Cancellation of shares is no more a reduction of capital than is forfeiture of shares. The objection to the validity of the cancellation is, that it is *ultrà vires;* but the very object of the 74th article is to provide that the assent of the company in general meeting shall validate that which, but for such assent, might have been invalidated as being *ultrà vires.* That assent is to prevent the impeachment of any contract by reason that the same was not within the business and objects of the company, or on any other ground whatsoever. That assent has been given to the agreement in question, each and every part of it, and it seems to me to follow as a consequence that each and every part of it has been rendered valid and unimpeachable.

This being so, ought or ought not the Plaintiff to be on the list of contributories as a present member of the company?

The result of the decisions bearing on this point may be simply stated. First: If a man has become a shareholder in such a way as that the contract is voidable at his option, but not at the company's, then, if he has not avoided the contract, or done what is tantamount to avoiding it, before the winding-up, he is held liable as a contributory.

Again, if a man being a shareholder has sold his shares, he is not relieved from being a contributory, if, owing either to his own neglect or that of his transferee, or if, in fact, owing to any cause except the neglect of the company, his transferee's name has not been substituted for his at the date of the winding-up. If the omission to substitute the name of the transferee is owing entirely to the neglect and default of the company he will be relieved.

Again, every one, be he shareholder or outside creditor, must be taken to deal with a company according to its constitution as appears from its memorandum and articles of association, and cannot complain of what may be lawfully done pursuant to that constitution, however it may affect him.

What, then, is here the case which has to be solved? Simply this: first, a valid and binding contract dated the 6th of December, 1866, which provides that the company shall "forthwith" cancel all shares standing in the name of the Plaintiff, upon which the full amount shall not have been paid up; secondly, a valid and binding contract which contains a release of the provisions of the agreement of the 15th of July, 1865, being the agreement under which the shares were taken; thirdly, the assent of the company to the agreement at two meetings held respectively on the 21st of January and the 5th of February, 1867; fourthly, a winding-up which must be taken to have commenced on the 13th of February; fifthly, everything done by the Plaintiff which ought to have been done by him; sixthly, his name on the register at the date of the winding-up. Before that period, however, he had legally ceased to be a shareholder, and if anything was not done which ought to have been done, the default was the default of the company.

For these reasons, and under the circumstances, I am of opinion that the Plaintiff's name ought not to be on the list of contributories in the character of a present member. As however he was a member up to and including the 5th of February, 1867, the question is, in substance, more a question between him and the other shareholders than between him and the creditors, for there could scarcely have been new creditors between the 7th and the winding-up; and no cancellation can affect a past liability. The Plaintiff therefore is entitled to a decree for specific performance, together with the costs of the suit, such costs however to be carried in for proof and payment under the winding-up. The Plaintiffs' name must be taken from the list of contributories as a presen member, but without prejudice to any application that may be made to make him a contributory as having been a past member; and then a bond must be executed by the Defendants *Cannock* and *Romanes*, to be settled in Chambers if the parties differ. There will be no costs except those which I have directed to be proved under the winding-up.

Solicitor for the Plaintiff: Mr. *J. I. Solomon.*

Solicitors for the Defendants: Mr. *R. H. Peacock;* Messrs. *Ashurst, Morris & Co.*

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Nov. 5, 6, 14;
Dec. 19, 22.

Mortgagor and Mortgagee—Second Mortgagee without Notice—Deposit of Title Deeds—Purchase of Prior Incumbrance—Priorities—Custody of Title Deeds—Production.

J. T. being the equitable owner of a moiety in lands, under the will of a testator who had, in 1806, purchased the entirety, in 1812 conveyed the moiety upon trust to pay an annuity, and subject thereto, for himself in fee. In 1823, he purchased the legal fee simple in the second moiety. By a settlement in 1825 he charged the two moieties with a sum to be raised at his death. In 1830 he again mortgaged the first moiety only, and he, or his solicitor (who was also a trustee of the settlement), deposited with the second mortgagee the purchase deeds of 1806, and the deeds of charge of 1812. In 1832 the second mortgagee first had notice of the settlement, and in 1835 she bought in the annuity. The annuitant died in 1837. In 1851 the trustee of the settlement died. Since 1832 the second mortgagee had been in possession. *J. T.* died in 1866:—

Held, that a title by adverse possession had not been acquired by the second mortgagee:

Held, further, that the second mortgagee, had not by purchase of the annuity, acquired priority over the first mortgagee:

Held, further, that possession of the title deeds did not give the second mortgagee priority:

Held, further, that the second mortgagee could not be deprived of the custody of the deeds; but upon a sale being decreed, the deeds were ordered to be produced, at the instance of the parties interested in the second moiety, who would be at liberty to take attested copies.

Observations on the form of the order.

11 Eq 301-2, 307,
12 Eq 81,
7 Ch 80
18 Eq 226-8 232-9
10 Ch 27
18 Ch D 566
21 Ch D 139

WILLIAM THORPE (1), by his will, dated the 21st of May, 1805, gave to his wife *Elizabeth* two life annuities of £50 each, one to be charged on the estate thereby devised to his son *William* (2), the other upon the estate devised to his son *John*. He then devised certain lands and hereditaments at *Waddingham, Lincolnshire*, hereafter described as lands (*A.*) to his sons *William* (2) and *John*, their heirs and assigns for ever, as tenants in common. At the date of his will, the testator had only a contract for the purchase of these lands, which, by deeds dated the 10th and 11th of October, 1806, were conveyed to him in fee. The testator died on the 6th of April, 1807; upon which event the legal estate in lands (*A.*) descended to his heir-at-law, *William Thorpe* (2), as a trustee for himself and *John Thorpe* as tenants in common.

John Thorpe upon his father's death entered into possession of his moiety, and by deeds dated the 7th and 8th of February, 1812 (*Elizabeth Thorpe* having previously released her annuity), *John Thorpe* assured his moiety to *George Thorpe* and *George Minnitt*, and their heirs, upon trust for securing the annuity of £50 to *Elizabeth Thorpe* as therein mentioned, and subject thereto, upon trust to assure the hereditaments to *John Thorpe*, his heirs and assigns.

In 1823, *John Thorpe* purchased the other, namely *William's* (2), moiety in lands (*A.*), and by indentures of lease and release dated the 25th and 26th of April, 1823, *William's* (2) moiety of lands (*A.*) was assured to the usual limitations to bar dower in favour of *John Thorpe*, his heirs and assigns.

By indentures of lease and release, dated the 25th and 26th of April, 1825, and made between *William Hemsworth Wilkinson* and *George Thorpe* of the one part and *John Thorpe* of the other part, *John Thorpe* thereby first appointed a moiety, and secondly granted and released the entirety, of the lands (*A*), and also other lands (*B.* and *C.*), to *Wilkinson* and *George Thorpe*, and their heirs, upon the same trusts as were contained in an indenture of release of the 13th of May, 1813 (being *John Thorpe's* marriage settlement), such trusts being for *John Thorpe* and his assigns for life, and after his death upon trust that the trustees (who were the same *W. H. Wilkinson* and *G. Thorpe*) should, by and out of the rents and profits, or by mortgage or sale, levy and raise £3000, and subject thereto, should hold the lands, or the unsold parts thereof, as *John Thorpe* should appoint, and subject thereto, in trust for his right heirs. The trusts of the £3000 were for the Plaintiff, *Catherine*, wife of *John Thorpe*, for life, and after her death for the children of the marriage in equal shares.

In 1828, *John Thorpe* agreed in writing to mortgage his original moiety of lands (*A.*) to *Mary Nelson*, to secure £1700 and interest, with the additional security of a deposit of title deeds and a bond; and by a bond dated the 5th of January, 1830, *John Thorpe* became bound to *Mary Nelson* in the penal sum of £3400, conditioned to be void on payment by him, his heirs, &c., of £1700 with £5 per cent. on the 5th of July then next. By an indorsement on this bond under his hand, he charged a moiety of lands (*A*) with the sum of £1700, and a judgment attending the same, and agreed that he, his heirs, executors, or administrators, would further assure the premises as the counsel of *Mary Nelson*, her executors, administrators, or assigns, should advise. At the same time *John Thorpe*, or *George Thorpe* his solicitor, deposited with *Mary Nelson* the deeds of the 10th and 11th of October, 1806, and of the 7th and 8th of February, 1812.

In 1832 *John Thorpe* was adjudged bankrupt, and *George Thorpe* was appointed his assignee; and then, for the first time, *Mary Nelson* had knowledge of the settlement of 1825. *George Thorpe* acted as *John Thorpe's* solicitor in the above loan transaction of 1828 and 1830, and *Mary Nelson* had no independent solicitor.

In November, 1834, *Mary Nelson* was, as Defendants alleged, by her agents in possession of *John Thorpe's* moiety, and so remained till her death.

By indentures dated the 2nd and 3rd of March, 1835, and subsequent deeds indorsed thereon, *Mary Nelson* purchased *Elizabeth Thorpe's* annuity of £50, so far as the same was chargeable on *John Thorpe's* moiety, for the sum of £150.

In or about January, 1836, *William Thorpe* (2) died, and in April, 1837, *Elizabeth Thorpe* died.

There were two children only of the marriage of *John* and *Catherine Thorpe* who attained a vested interest in the £3000, *John Thorpe* the younger and *William Thorpe* (3).

In the year 1848, £401, part of the £3000, was raised by sale of lands (*B*), and paid to *John Thorpe* the younger and *William Thorpe* (3).

Later in the year 1848, by two indentures, dated respectively the 2nd of October and the 25th of November, *John Thorpe* the younger and *William Thorpe* (3) respectively assigned each a moiety of the sum of £2599 (being £3000 less £401) to the Plaintiff *Thomas Fowler*, his executors, administrators and assigns absolutely.

In the year 1851 *George Thorpe*, having survived his co-trustees, died intestate as to real estate.

On the 13th of July, 1866, *John Thorpe* died intestate.

In September, 1866, the Defendants *Samuel Leeke Bingham* and *John Henry Burkill*, were appointed trustees of the deeds of 1813 and 1825.

This bill was filed on the 26th of February, 1867, by *Catherine Thorpe* and *Thomas Fowler* against *William Holdsworth* and *Thomas Hodgkinson* the younger, *Richard Colton*, *Alfred John Pogson*, and *Harriett* his wife, and the trustees *Bingham* and *Burkill*, for the purpose of having the sum of £2599 raised and invested pursuant to the trusts of the release of 1813. The Plaintiffs charged that they had requested the Defendants *Bingham* and *Burkill* to raise this sum out of the hereditaments comprised in the deeds of 1825, but that they alleged they were unable to do so, by reason of the claims of the other Defendants.

The Defendants *Holdsworth* and *Hodgkinson*, and the Defendant *Colton*, each filed answers; but the decision as to them became in the result unimportant.

The principal Defendants were *Alfred John Pogson* (the sole proving executor of the will of *Mary Nelson*, who died in 1860), and *Harriett* his wife, to whom *Mary Nelson* had by her will devised and bequeathed all her moiety or other share, estate, and interest of and in lands (*A.*), and all moneys that might be due to her in respect thereof. They submitted as follows:—

Mary Nelson was a mortgagee of *John Thorpe's* moiety for valuable consideration without notice of the settlement of 1813 and the deed of substitution of 1825.

Further, being an equitable incumbrancer on such moiety, she acquired by the purchase in 1835 of *Elizabeth Thorpe's* annuity, a right paramount to the persons claiming under the settlement of 1813 and the deed of 1825, to call for a conveyance of the legal estate of the moiety. Even assuming she had notice of the deeds of 1813 and 1825, she had priority over the equitable incumbrancers under the same deeds, and the Defendant Mrs. *Pogson* was entitled to hold the premises as a security for the arrears of *Elizabeth Thorpe's* annuity so far as it affected the premises, and for what might be found due on *Mary Nelson's* securities.

They further said, that since *Mary Nelson's* death they had been in possession, and that no acknowledgment of the title of *John Thorpe*, or of those claiming under him, had been made in writing by them, or, as they believed, by *Mary Nelson*, or any one claiming under them; that ever since the deposit of the 5th of January, 1830, the title deeds had been in the possession of *Mary Nelson* and themselves, and under these circumstances they submitted that all equity of redemption in *John Thorpe's* moiety had become barred, and that they were entitled to hold the land for an estate in fee simple free from incumbrances.

On the 27th of July, 1867, the Plaintiff *Catherine Thorpe* died, and the bill was amended on the 16th of November following.

Mr. *Kay*, Q.C., and Mr. *Freeman*, for the surviving Plaintiff:—

As to the Defendants, *Pogson* and wife—that the *Statute of Limitations* cannot assist them appears, if necessary, from *M'Carthy* v. *Daunt* (1).

John Thorpe cannot be held to have acquired the legal estate by possession adverse to the trustees of 1813 and 1825; and if not *John Thorpe*, neither can his mortgagee.

As to any claim of the Defendants founded on possession of the title deeds, *Newton* v. *Newton* (2) shews that where a deposit of deeds has been made by a trustee, the *cestui que trust* is entitled not only to priority over the depositee, but to delivery up of the deeds.

Mr. *W. M. James*, Q.C., and Mr. *Smart*, for the Defendants *Holdsworth* and *Hodgkinson*.

Mr. *Nalder*, for the Defendant *Colton*.

Mr. *Willcock*, Q.C., and Mr. *Horton Smith*, for the Defendants *Pogson* and wife:—

The legal estate in *John Thorpe's* moiety was, at his father's death, in 1807, and thereafter, outstanding in *William Thorpe* (2) and his heir. Consequently all that *John Thorpe* had to settle, and did settle, as to his moiety, by the deeds of 1825, was an equitable interest. In other words, as to this moiety the Plaintiff had only an equitable title, like ourselves.

Colyer v. *Finch* (3) shews that the position of the legal estate in these cases is immaterial, but, considering that the Plaintiff and we are equitable claimants, our priority has given us the better right to call for a conveyance of the legal estate. *Mary Nelson*

(1) 11 Ir. Eq. 29.

(2) Law Rep. 6 Eq. 135.

(3) 5 H. L. C. 905, 920. 3 Jur NS 25.

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was a purchaser for value in 1830, without notice of the settlement, and she received the deeds either from *John Thorpe* or *George Thorpe,* his solicitor and trustee. The existence, therefore, of the settlement was studiously concealed from her; no diligence of hers could have discovered it: *Jones* v. *Powles* (1). She then having, in 1835, got in *Elizabeth Thorpe's* charge of 1812, thereby became an incumbrancer prior in date to the Plaintiff. This, coupled with possession of the deeds of 1806 and 1812 (and as to the latter notwithstanding, if it be the fact, that *Elizabeth Thorpe's* annuity is satisfied), give us a superior equity: *Willoughby* v. *Willoughby* (2); *Marsh* v. *Lee* (3).

John Thorpe, as equitable tenant for life, was entitled to hold the deeds: *Lady Langdale* v. *Briggs* (4); but the trustees should have imposed such terms on the custody as would have prevented this fraud. By lying by, and permitting the fraud, they have forfeited their priority: *Troughton* v. *Gitley* (5); *Tucker* v. *Hernaman* (6). The Plaintiff's remedy is against them for breach of trust.

Even if the equities of the Plaintiff and ourselves be equal, possession of the deeds is sufficient to turn the scale in our favour, whether *John Thorpe* was the depositor, *Layard* v. *Maud* (7), or *George Thorpe,* as his solicitor: *Lloyd* v. *Attwood* (8); and we, as purchasers for value without notice, are entitled to use the possession of the deeds as a shield against the Plaintiffs: *Joyce* v. *De Moleyns* (9); *John Thorpe* having had, at the date of the mortgage to *Mary Nelson,* ample interest in the property charged, within the doctrine of the Master of the Rolls in *Newton* v. *Newton* (10).

Mary Nelson did not prove for her debt under *John Thorpe's* bankruptcy, but remained in adverse possession of the moiety till her death. We rely on our title by adverse possession without acknowledgment.

Even if we are to be treated as mortgagees, the Plaintiff ought to have offered to redeem us, which he does not do.

(1) 3 My. & K. 581.

(2) 1 T. R. 763; Belt's Suppt. to Ves. Sen. 441.

(3) 1 Wh. & T. L. C. 3rd Ed. 550, 553, n, and the cases there collected.

(4) 8 D. M. & G. 391, 416.
2 Jur NS 982

(5) Amb. 630.

(6) 4 D. M. & G. 395.

(7) Law Rep. 4 Eq. 397.

(8) 3 De G. & J. 614. 5 Jur NS 1322

(9) 2 J. & Lat. 374.

(10) Law Rep. 6 Eq. 135, 141-2.

Lastly: not the Plaintiff, but, if any one, his trustees, ought to have instituted this suit: *Troughton* v. *Binkes* (1); *Jerdein* v *Bright* (2).

[*Sugden's* Vendors and Purchasers (3), and the remarks (4) on *Phillips* v. *Phillips* (5), were also referred to.]

Mr. *Herbert*, for the trustees.

Mr. *Kay*, in reply:—

The purchase by the Defendants of a prior equitable incumbrance gives them no advantage. It might have been otherwise had they got in the legal estate; but this they have not done.

Rooper v. *Harrison* (6) is a leading authority to shew that priorities must depend upon the dates of the creation of the respective incumbrances, irrespective of notice.

Even if the Defendants had no notice, they could take from trustees no better estate than the trustees could give them.

Nov. 14. SIR G. M. GIFFARD, V.C., after stating the facts and the several defences, observed that he had already decided at the hearing that the Defendant *Colton* was simply in the position of a person having an estate subject to a charge; and that the Defendants *Holdsworth* and *Hodgkinson* could make no claim in priority to the Plaintiffs on the ground that they derived title through *John Thorpe*, that they did not stand in any better position than he would have stood in, and that he could in no way raise any claim until after the £3000 had been first duly paid. His Honour continued:—

With respect to the claim of the other Defendants, *Alfred John Pogson* and *Harriett* his wife, the date of *John Thorpe's* death is enough to dispose of the defence of the *Statute of Limitations*. As regards the rest of the defence, the case made by the Plaintiff is one which on the face of it is complete, and it rests entirely with the Defendants to allege and prove some ground for defeating it.

(1) 6 Ves. 573.
(2) 2 J. & H. 325.
(3) Pages 682, 738.
(4) Pages 796-798.
(5) 31 L. J. (Ch.) 321.
(6) 2 K. & J. 86.

6 Jur N.S. 1145.
4 De G F & J 408

They do not allege, and cannot be taken to allege, that they have the legal estate. They allege it to be outstanding in the heir of *William Thorpe* (2), and it appears to be so outstanding. The grounds on which they allege that they have the best right to call for the legal estate are, first, the fact of their being assignees of all the rights and interests of *Mary Nelson*, and of their having as such, amongst other things, the deeds of the 8th of February, 1812. I have altogether failed to see any reason why the possession of those deeds by them as assignees of *Mary Nelson* can give them the best right to call for the legal estate. Then it is said that they are mortgagees, and as mortgagees, purchasers for value without notice; and, that, besides, their possession of the title deeds generally gives them priority.

True it is that neither *Mary Nelson*, nor these Defendants, had notice of the Plaintiff's charge; but from the case of *Brace* v. *Duchess of Marlborough* (1) down to *Finch* v. *Shaw* (2) and *Rooper* v. *Harrison* (3), the rule has always been that which was laid down by the Lord Justice *Wood* in the last of these cases, and in *Stackhouse* v. *Countess of Jersey* (4), namely, that, as between equitable incumbrancers, relief will be given to the incumbrancer prior in point of date, unless he has lost his priority by some act or neglect of his; and that relief will not be refused to him as against a subsequent incumbrancer on the sole ground of the latter being a purchaser for value without notice, unless he has the legal estate, or the best right to call for it.

This being so, what I have to consider, first, is, whether there is anything in this case to postpone the priority of the Plaintiff's mortgage, and I am of opinion that there is not; for in point of fact no negligence as to the deeds is proved. The allegation in the answer is, that either *John Thorpe* or *George Thorpe* handed over the deeds; *George Thorpe* being one of the trustees, and therefore one of the persons who had a perfect right to the custody of the deeds: and, though it was urged that the mere custody of the deeds was enough to give the Defendants priority, I am of opinion that this is not so, nor can I take *Layard* v. *Maud* (5) to

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(1) 2 P. Wms. 491.

(2) 19 Beav. 500. 18 Jur 935

(3) 2 K. & J. 86.

(4) 1 J. & H. 721. 7 Jur NS 359

(5) Law Rep. 4 Eq. 397.

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be an authority for such a proposition. It appears that in that case there was conduct amounting to acquiescence in what was done on the part of the first mortgagee, and the decision was founded on *Roberts* v. *Croft* (1), which is one among many authorities for the proposition, that the mere possession of the title deeds by a second mortgagee, through a purchaser for value without notice, will not give him priority. There must be some act or default on the part of the first mortgagee to have this effect.

Nothing of this description is proved in this case.

I have, therefore no difficulty in going the length of declaring the Plaintiff's priority; and, regard being had to the nature of the security, and the 48th section of the 15 & 16 Vict. c. 86, in directing a sale.

But whether I can or cannot deprive the subsequent mortgagee of the custody of the deeds is a different, and, regard being had to the authorities, a difficult question.

The point was discussed by Lord *Cottenham* in the case of *Frazer* v. *Jones* (2). In the result he found it unnecessary to decide the question. The Lord Justice *Wood* also discussed the question in *Stackhouse* v. *Countess of Jersey* (3), but he also found it unnecessary to come to a decision on the point.

In this case, the Defendants claim to be interested in a moiety of the property only, admitting that some one else is interested in the other moiety. At the instance of the persons interested in the other moiety they may be compelled to produce, though not to part with, the deeds relating to the entirety. I therefore can order a sale and a production of the deeds; and, of course, attested copies can be taken. The right to retain the deeds, therefore, is not of much pecuniary value. At the same time I am bound to give my opinion on it.

If the question had been *res integra* I should not hesitate, and I infer that neither Lord *Cottenham* nor the Lord Justice *Wood* would have hesitated, as to the conclusion to be come to on the subject. Unfortunately, however, it is not *res integra*. In *Head* v. *Egerton* (4) Lord *Hardwicke's* opinion, though he refers in some

(1) 2 De G. & J. 1. 3 Jur N.S. 1069
(2) 17 L. J. (Ch.) 353; 12 Jur. 443.
(3) 1 J. & H. 721. 7 Jur N.S. 359.
(4) 3 P. Wms. 280.

measure to the conduct of the first mortgagee, appears to be against ordering a delivery up of the deeds. *Wallwyn* v. *Lee* (1), a decision of Lord *Eldon's*, is direct on the point, and has been so treated by Lord *St. Leonards* in *Joyce* v. *De Moleyns* (2).

Therefore, considering myself bound by these authorities, I shall not make any decree depriving the Defendants *Alfred John Pogson* and *Harriett* his wife of the possession of the deeds. Beyond this, I do not consider my hands tied, and the order I shall make is a declaration, first, that the charge vested in the Plaintiffs and their trustees is a first charge on the entirety of the property in the pleadings mentioned, and that they, by force of that charge, have a right to have the legal estate conveyed as they may direct, and to have what is due for principal, interest, and costs, raised by a sale of the property. I shall then order an immediate sale of the property, with liberty to apply for directions as to the parties who are to join in the conveyance, and as to the proceeds to arise from the sale. I shall also order the Defendants *Alfred John Pogson* and *Harriett* his wife, to produce, for the purposes of the sale, all deeds and muniments of title in their or either of their possession or power relating to the entirety of the property; and there will be besides an account of what is due to the Plaintiff for principal, interest, and costs; and I shall appoint a receiver: but *Alfred John Pogson* and *Harriett* his wife will not be required to hand over the title deeds to him. There will probably be no surplus after paying the first charge; if there is, it can be dealt with subsequently to the sale.

It was suggested in the course of the argument that the Plaintiff's trustees were the only proper parties to be Plaintiffs. I am not of this opinion. The costs of the two last-named Defendants, who are trustees, must in point of fact be taxed and paid together with the Plaintiff's costs. The suit is really a suit for carrying into effect the settlement of May, 1813, and the Defendants are all necessary parties for that purpose, though not entitled to costs as against the persons interested in the prior charge.

The decree must be without prejudice to such proceedings, if any, as may be taken at law in respect of the deeds, or any of them, against *John Pogson* and his wife.

(1) 9 Ves. 24.

(2) 2 J. & Lat. 374.

Dec. 19, 22. By the draft decree it was declared that the Plaintiff's security was a first charge on the hereditaments; and that he was entitled to have the sum of £2599 raised by sale; then it was ordered that the costs of the trustees as between solicitor and client be taxed and paid by the Plaintiff; for an account of what was due to the Plaintiff, including such costs; then a sale, with liberty to any party not having the conduct of the sale to bid; and then that "for the purposes of the sale the said Defendants *Alfred John Pogson* and *Harriett* his wife do produce all deeds and documents in their custody or power relating to the said hereditaments as the Judge shall direct;" then that a receiver be appointed, with liberty to apply.

The Plaintiffs moved to insert in the decree after the opening declarations, the following clause; "and it is ordered that the Defendants *Holdsworth* and *Hodgkinson*, and the Defendant *Colton*, do deliver upon oath to the Plaintiff *Fowler* all deeds and documents in their or either of their possession or power relating to the property comprised in the indenture of settlement of the 25th of April, 1828."

The insertion of these words had been objected to in the Registrars' office as irregular.

The point having been spoken to on minutes,

The Vice-Chancellor said there could be no doubt that the clause which the Plaintiff proposed to insert was not one which the ordinary forms of the Court could justify. The Registrar had stated that a direction for the delivery up of deeds was not now an ordinary part of a decree of this kind. But this decree differed from the ordinary case in this respect, that certain parties, namely, *Alfred John Pogson* and *Harriett* his wife, were thereby, for the purposes of the sale, ordered to produce the deeds in their custody or power, and consequently it became necessary to say something as to the deeds in the possession of the other Defendants, for if a decree ordered two of the Defendants to produce, and not the rest, the inference would be that the others were not to produce at all. The form, therefore, would be, after striking out the clause proposed by the Plaintiff, to order that the Defendants *Alfred John Pogson* and *Harriett* his wife were not to deliver

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over the deeds and writings in their custody or power, but that they were to produce them for the purposes of sale; that all other parties were to produce the deeds in their custody or power for the purposes of sale; and as to the last-mentioned deeds, that the purchaser was to be at liberty to apply in Chambers as he might be advised.

His Honour added that upon such application he should not hesitate to order the last-mentioned deeds to be delivered over to the purchaser.

The date of the decree would not be altered; so that each party would be left to bear his own costs of the present application.

Solicitors for the Plaintiff: Messrs. *Rogerson & Ford,* for Messrs. *W. E. & B. Howlett, Kirton-in-Lindsey.*

Solicitors for the Defendants: Messrs. *W. & H. P. Sharp,* for Mr. *John Whall, Worksop;* Messrs. *Coverdale & Co.*, for Messrs. *Hett, Freer, & Hett, Winterton;* Messrs. *Austen, De Gex, & Harding,* for Messrs. *Percy, Goodall, & Brown, Nottingham.*

In re PHILPS' WILL.

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Jan. 23, 25.

9 Eq 258. 9 260,
14 Eq 162
[illegible]
5 Ch D 497
4 PD 82
23 Ch D 738
74 [illegible]
25 Ch D 213

Will—Gift to "Children then living or their Heirs"—"Heirs"—Next of Kin when ascertained.

A testator, by his will, directed that a sum of stock should after the death of his wife be divided among his "children then living, or their heirs." Two of the children were dead at the date of the will; three survived the testator and died in the lifetime of his wife; and two survived her:—

Held, (1), that the "heirs" of the children who predeceased the wife (including the two who were dead at the date of the will) were entitled to share in the fund along with the children who survived her; (2), that by "heirs" were meant the statutory next of kin of the children; (3), that such next of kin were to be ascertained, in the case of the children who survived the testator, at the time of the death of each child; but in the case of the children who predeceased the testator, at the time of the testator's death.

Hamilton v. *Mills* (1) distinguished.

By a settlement made in November, 1830, on the occasion of the marriage of *Thomas Philps* with *Eunice* his fourth wife, it was agreed that the trustees thereof should stand possessed of a sum of £1400, New 3½ per Cent. Stock, upon trust to pay the income thereof to *Eunice Philps* during her life, and immediately after her decease upon trust for such persons as *Thomas Philps* should by his last will appoint.

In December, 1835, *Thomas Philps* made a codicil to his will in the following terms:—"The marriage agreement between *Thomas Philps* and *Enice Philps* made November, 1830, is that I, *Thomas Philps*, have transferred 14 hundred pounds of the 3½ per Cent. Stock of the *Bank of England*, the interest for the use of my dear beloved *Enice* during her life, if I should die first, and after her death to be divided between my children than living, or there heirs."

Thomas Philps died in July, 1836; and *Eunice Philps* in December, 1866.

Thomas Philps had seven children. Two of these children were dead at the date of the codicil, one a daughter, *Susanna*, who married and left issue one son, *John Abel*; the other, *Thomas Nathaniel*, who left no issue.

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(1) 29 Beav. 193.

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Three survived their father, and died in the lifetime of *Eunice Philps*, viz.:—*John*, who left his widow and one son, *Walter*, him surviving; *James*, who was never married; and *Richard*, who left his widow and several children him surviving.

The remaining two children, *Thomas* and *Sarah*, survived *Eunice Philps*; *Sarah* had since died.

Upon the death of *Eunice Philps*, the fund subject to the trusts of the settlement was transferred into Court; and a Petition was presented by *Thomas Philps* and the representatives of *Sarah* for the distribution thereof.

Sir *R. Baggallay*, Q.C., and Mr. *Bristowe*, for the Petitioners, claimed the whole fund, as representing the only children who survived the tenant for life. The gift was to the children living at the death of the testator's wife; but if there should be no child then living, then to the heirs of all the children. The "heirs," therefore, were only to take in the event of there being no children then living.

Mr. *Hanson*, for *Walter Philps*, contended that under the words "or their heirs," the "heirs" of children who died before the tenant for life were entitled to share: *King* v. *Cleaveland* (1); and that by "heir" was meant the heir-at-law of the deceased child: *Hamilton* v. *Mills* (2); *In re Rootes* (3).

Mr. *Rawlinson*, for the other Respondents, with the exception of *John Abel*, submitted that the "heirs" of the two children who were dead at the date of the codicil were not entitled to share.

Mr. *Hadley*, for *John Abel* (who was heir-at-law and sole next of kin of his mother, and also one of the next of kin of several of the deceased children), contended that the "heirs" of the children who were dead at the date of the codicil were not excluded; and that by "heirs" were meant the next of kin under the Statutes of Distribution: *Doody* v. *Higgins* (4); *In re Porter's Trust* (5).

Sir *R. Baggallay*, in reply.

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(1) 26 Beav. 26, 166; 4 De G. & J. 477.

(2) 29 Beav. 193.

(3) 1 Dr. & Sm. 228.

(4) 2 K. & J. 729.

(5) 4 Ibid. 188. 4 Jur. N.S. 20

Jan. 25. LORD ROMILLY, M.R., after stating the facts, continued:—

The first question is, who takes under these words: "My children then living or their heirs?" Who are the persons who constitute the class to take? Are the heirs of children deceased included, and if so, are the heirs of all the children let in?

I was referred to the case of *King* v. *Cleaveland* (1) as conclusive upon the subject, and the more I consider that case, the more I think that it is conclusive; and that the word "or" is to be taken conjunctively, and that, therefore, the gift includes the heirs of deceased children. That being so, I think it includes the heirs of all deceased children, and that it is impossible to make a distinction with reference to those who died in the lifetime of the testator. I think he intended all to take, or he would have made some distinction. One of them has left a child. It is clear he intended that child to take. If he had intended to make a distinction, he would have excluded the particular child who predeceased him and who left no children.

The next question is, the meaning of the word "heirs," and it was upon that I was more desirous of looking into the cases, for with regard to the other point I was completely satisfied with the exact application of the case of *King* v. *Cleaveland*, which was elaborately discussed by the Judges of the Court of Appeal, who affirmed the view taken at the Rolls. The question is who takes under the word "heirs." I do not think the case of *Hamilton* v. *Mills* (2) governs this case. I think that was a peculiar case. There I came to the conclusion that the exact words being "the right heir," the testator meant to give it to the heir-at-law as a *persona designata*. That is not so here. I think the testator uses the word "heir" as it is commonly, I may say, vulgarly, used in society, for the person who takes the property after another person's death; that is, he meant those to take the property who would take it according to law if the property had vested in the person in his lifetime and he had died without making a will. The consequence is, that I think the next of kin of all the five deceased children will take along with the two who survived.

15 Eq 113

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(1) 4 De G. & J. 477.
(2) 29 Beav. 193.

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Mr. *Hanson*:—Will your Lordship say whether the next of kin are to be ascertained now or at the death of the testator?

Mr. *Hadley*:—In *King* v. *Cleaveland* (1), it was held that the next of kin were to be ascertained at the death of each child.

Lord Romilly, M.R.:—That point was not argued, but it is now settled by the decision of the House of Lords that the next of kin are to be ascertained at the death of each child.

Mr. *Hadley*:—With regard to the two children who died in the testator's lifetime, the next of kin will be ascertained at the death of the testator.

Lord Romilly, M.R.:—Yes; because the will does not take effect until then.

Solicitors: Messrs. *Heather, Son, & Gill*; Messrs. *Randall & Angier*, agents for Mr. *J. D. Down, Dorking.*

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Dec. 11, 14, 15.

HEYMANN *v.* EUROPEAN CENTRAL RAILWAY COMPANY.

Company—Shareholder—Misrepresentation—Suppressio veri—Payments by Promoter to Directors—Delay.

13 Eq 99
15 Eq 253
8 C.P. 332
10 Ch 597
2 Ch D. 673
4 Ch D. 870
3 App Cas 1214
24 Ch D 153

A company was formed for the purpose of making and working a railway in *Switzerland* under a concession vested in *H.*, a contractor, and transferred by him to the company under an agreement by which he obtained the contract for making the line, the terms of the contract being stated in the articles of association. Before the formation of the company *H.* agreed to give *S.*, who afterwards became the chairman of the board of directors, £2000 worth of paid-up shares, and after the company was formed he paid the deposit and allotment moneys on the shares taken by *S.* and several other directors, and gave to *C.* and *W.*, who afterwards became directors, bills for £10,000, in consideration of their procuring a credit company to bring out the company. The directors issued a prospectus, which contained no misrepresentations, but did not mention the transactions between *H.* and the directors:—

Held, that there was no such suppression of material facts in the prospectus, as to entitle a person who had been induced by it to take shares in the company, to be relieved of his shares.

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(1) 4 De G. & J. 477.

Semble, that a shareholder who institutes a suit to be relieved of his shares on the ground of misrepresentation more than three months after he has discovered the misrepresentation, loses his right to relief by his delay.

IN June, 1863, *Howard Ashton Holden*, a railway contractor, and four other persons, obtained from the canton of *Tessin*, in *Switzerland*, a concession for making a railway from *Chiasso* to *Bellinzona* and *Biasca*, and a branch from *Bellinzona* to *Locarno*, with a preferential right of extending the line to *Lucerne* or *Coire*, so as to effect a junction between the systems of railways north and south of the *Alps*. The beneficial interest in the concession was vested in *Holden*. In October, 1863, *Holden* applied to Colonel *Sykes*, the chairman of the *East India Company*, to assist him in forming a company to carry out the concession, and *Sykes* agreed to do so, provided that he incurred no pecuniary responsibility. *Holden* thereupon wrote and gave to *Sykes* the following letter:—

"*London*, Nov. 11, 1863.

"Sir,—In consideration of the assistance you have on public grounds rendered me in organizing the *Central European Railway Company*, I hereby undertake to transfer to you one hundred paid-up shares of £20 each.

"*H. A. Holden*."

"To *Colonel Sykes*, M.P."

Holden also procured the consent of several other persons to act as directors of the proposed company, some of whom he promised to provide with the shares that might be requisite to qualify them for the office. Various meetings of these provisional directors were held, *Sykes* being chairman. On the 13th of January, 1864, *Holden* sent to the provisional directors a written proposal to undertake the contract for the construction of the proposed railway for £1,100,000, of which £200,000 might be paid in paid-up shares of the company. The directors referred this offer to Mr. *Bidder*, whom they had appointed their consulting engineer, and having been advised by him that under the circumstances the terms proposed were reasonable, they passed a resolution on the 19th of January accepting the proposal. *Bidder*, in his evidence in the suit, stated that he had based his advice upon the sections,

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plans, and estimates furnished by *Holden*, which he had not checked, assuming them to be correct.

On the 20th of January, 1864, the company was formed and registered as a limited company under the *Companies Act*, 1862, under the name of the *European Central Railway Company, Limited*, with a nominal capital of £1,400,000, the first issue to be £700,000 in 35,000 shares of £20 each. The memorandum of association was subscribed by seven nominees of *Holden* for five shares each.

The articles of association empowered the directors to consolidate the shares into shares of a larger nominal value, and provided that the first directors should be appointed by the subscribers of the memorandum, and that all future directors until the meeting of the company in the year 1866, should be appointed by the board. The holding of fifty shares was prescribed as the qualification for directors, but this did not apply to directors appointed before the meeting in 1866.

The 95th clause was as follows:—“The concession dated the 16th day of June 1863 (mentioned in the memorandum of association), granted by the canton of *Tessin*, in *Switzerland*, to Messrs. *James Alfred Hallett*, *Octavius Ommanney*, *Henry Haggard*, *Robert George Sillar*, and *Howard Ashton Holden*, and since ratified by the Swiss Federal Government, and all the rights, privileges, benefits, and advantages secured by that concession, are to be assigned and transferred by or by the direction of *Howard Ashton Holden*, to whom the beneficial interest in the same belongs, to the said company, when and so soon as the said company shall pay to the said *Howard Ashton Holden* the sum of £30,000, being the amount of caution and other moneys disbursed by the said *Howard Ashton Holden* in and about securing the said concession, and the said company hereby agree to execute to the said *Howard Ashton Holden* a contract for construction of the necessary works of the railway, with all suitable buildings, from *Chiasso* to *Biasca*, in the canton of *Tessin*, with a branch railway from *Bellinzona* to *Locarno*, for a sum of £1,100,000 sterling, being the amount sanctioned by Mr. *George Parker Bidder*, C.E., the consulting engineer of the said company, according to such specification and upon such terms as shall be satisfactory to the said *Howard Ashton Holden*, and be approved by the said

George Parker Bidder, it being the intention of these articles of association to constitute the said *Howard Ashton Holden* the contractor for the construction of the said railway and branch railway, with all suitable buildings, at the sum of £1,100,000 sterling, and to secure to him the option of undertaking all future contracts which may be entered into by this company for extension of such lines or line, upon such terms as the board and the consulting engineer of the said company for the time being may deem reasonable and proper."

In March, 1864, *Holden* applied to *Thomas Cave*, sheriff of *London* and *Middlesex*, to introduce him to a credit company who would bring out his proposed company, and offered to give *Cave* £10,000 for such introduction. *Cave* applied for that purpose to *Cornelius Walford*, the managing director of the *Financial Corporation, Limited*, and offered him half the commission to be paid by *Holden*. *Walford* submitted the matter to the *Corporation*, and they agreed to bring out the company, upon the company paying them £5000 and adding one or two of their directors to the board of directors of the company. On the 18th of March, 1864, *Holden* gave to *Cave* and *Walford* ten bills of exchange of £1000 each, accepted by him, and they signed a letter by which they acknowledged the receipt of the bills, and undertook to renew all or any of them on payment of interest at 5 per cent. per annum, until *Holden* should receive "the promotion money or other payments" from the company. On the same day *Holden* gave to *Cave* and *Walford* a written undertaking that they should be "qualified free of cost to sit as directors in the company, and that they should be appointed directors."

On the 18th of March *Sykes* and nine other persons were appointed directors, and *Sykes* was elected chairman, and on the same day they ratified the agreement with the *Financial Corporation*. On the 21st of March *Cave* and *Walford* were elected directors, the latter on the nomination of the *Financial Corporation*.

On the 24th of March the directors passed a resolution altering the first issue of capital from 35,000 shares of £20 each to 17,500 shares of £40 each.

Each of the directors took twenty-five shares in the company, and *Holden* paid the deposit of £1 per share and the allotment money of £3 per share upon the shares taken by several of them, including *Sykes.*

At the end of March, 1864, the directors issued a prospectus of the company, which stated that the *Financial Corporation* invited subscriptions for shares in the company, and set out the names and descriptions of the chairman and directors, and stated (among other things) that "a responsible contractor had undertaken to construct and complete the line for a sum within the amount of capital," and that "the memorandum and articles of association, and a translation of the concession, lay for inspection at the offices of the company."

On the 1st of April, 1864, the Plaintiff, *L. Heymann,* applied for 200 shares, which were allotted to him, and he had, upon the institution of the suit, paid upwards of £3600 in respect of them.

In July, 1866, *Holden* wrote a letter to *Sykes* complaining that he had not received *Sykes*' support in carrying out the works of the company, and calling upon *Sykes* to repay the £100 paid by him in respect of *Sykes*' shares, to which *Sykes* replied by referring him to his solicitor, and reminding him of the "obligation dated the 11th of November, 1863."

In August, 1866, the Plaintiff was informed of this correspondence, and on the 8th of December, 1866, he filed the bill in this suit against the company, *Sykes, Cave,* and *Walford,* and two other directors, against whom he subsequently allowed the bill to be dismissed. The bill alleged that he had become a shareholder in reliance on the prospectus, and on the good faith of the persons named therein as directors, and upon the statements and representations in the prospectus being honest, and made by the directors acting in good faith in the interest of the persons who should become shareholders, and particularly that the contract referred to in the prospectus had been approved by the directors, without having any interest in respect thereof adverse to that of the shareholders, and without any pecuniary inducement or share or interest in the contract having been given or promised to them by the contractor; that he would not have applied for any shares if he had been informed of the bargains and arrangements between the several directors and the contractor; that the contract price and other payments agreed to be made to *Holden* were extravagantly great, and that the works might have been constructed at a much less price if the directors had acted in good faith in the interests of the company; that the Plaintiff, in August, 1866, received information which ultimately led to his discovery of the arrangements made between the directors and the contractor; and it prayed (1), that it might be declared that the Plaintiff ought to be relieved from his position of a shareholder in the company, and that the contract between him and the company ought to be rescinded, and that his name might be removed from the register of shareholders; (2) that the Defendants might be ordered to recoup to the Plaintiff his payments on account of the shares, and also, in case the relief sought by the first paragraph of the prayer should not be granted, to indemnify him against all further liability in respect of the shares.

Sykes, by his answer, stated that *Holden* had not transferred to him any paid-up shares in fulfilment of his obligation, and had never paid anything on his account, except the deposit and allotment money on the twenty-five shares; that the terms of the contract were fixed in reliance on the judgment of *Bidder;* and that *Holden* had continually failed to perform his contract, and had made repeated applications to the directors for pecuniary aid, which they had rejected.

Cave and *Walford*, by their answers, admitted that they had received upwards of £3000 each upon the bills given to them by *Holden.*

On the 28th of January, 1868, the company was ordered to be wound up.

Mr. *Southgate*, Q.C., and Mr. *Marten*, for the Plaintiff:—

The prospectus put forth by the company, by which the Plaintiff was induced to become a shareholder, suppressed the facts that the contractor who had the contract for executing the whole of the company's works had paid the deposit and allotment moneys on the shares of the directors, had agreed to give the chairman paid-up shares to the amount of £2000, which shares he could only get by means of the contract, and had given to two of the other directors bills for £10,000, which were to be renewed until

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he received the promotion money and other payments from the company. These were facts which materially affected the prospects of the success of the undertaking, and if known to the Plaintiff would have deterred him from becoming a shareholder; he is therefore entitled to avoid the contract which he was induced to make by the misrepresentation of the company: *Central Railway Company of Venezuela* v. *Kisch* (1); *New Brunswick and Canada Railway Company* v. *Muggeridge* (2); *Henderson* v. *Lacon* (3); *In re Reese River Silver Mining Company, Smith's Case* (4); *Kent* v. *Freehold Land Company* (5); *Ross* v. *Estates Investment Company* (6); *Oakes* v. *Turquand* (7); *Bates* v. *Hewitt* (8); *Maddeford* v. *Austwick* (9).

Any one reading this prospectus with the names of the directors prominently introduced would naturally believe that the directors were in a position to protect the interests of the company, and were prepared to incur the same risks and liabilities as other shareholders, but who would have become a shareholder if he knew that the directors were indemnified by the promoter and contractor against their liabilities as shareholders, and were under obligations to him which disqualified them from exercising a proper control over him in his dealings with the company, and that some of them were, in fact, interested in his contract? That contract itself was made without proper inquiries and in reliance upon the contractor's own estimates; it is true it was set out in the articles of association which were referred to in the prospectus, but no one could judge of the fairness or propriety of its terms by simply reading the articles, and persons intending to take shares would necessarily trust to the judgment of the directors, assuming them to be independent and disinterested. The directors, in fact, were inviting the public to become their *cestuis que trust* for the purpose of carrying out a contract in which some of themselves had an interest contrary to that of their *cestuis que trust*; the case, therefore, is within the principle by which the Court sets aside transactions between trustee and *cestui que trust: Ex parte Lacey* (1). It is true that there has been no case in which the concealment of the particular facts concealed in this case, viz., payments to or for the benefit of directors, has been made the ground for setting aside a contract to take shares; but this is only one of the many forms of fraud developed by the system of limited companies, to meet which the doctrines of Courts of Equity must be extended. The winding-up does not deprive the Plaintiff of his right to rescind the contract, inasmuch as he had instituted this suit long before its commencement: *Smith's Case* (2). That case is still a binding authority notwithstanding the *dicta* in *Oakes* v. *Turquand* (3): *Kent* v. *Freehold Land Company* (4); *Henderson* v. *Lacon* (5). The Plaintiff is therefore entitled to be relieved from his shares, and to have the money which he has paid for them repaid by the company and by the Defendant directors who authorized the issuing of the prospectus: *Henderson* v. *Lacon;* and if, in consequence of the winding-up the Plaintiff cannot be relieved from his shares, the directors, who, by issuing the prospectus, fraudulently induced him to take shares, must indemnify him against the liabilities which he has thereby incurred. The directors are severally as well as jointly liable, and the Plaintiff is entitled to relief against any of them without making the others parties to the suit: *Attorney-General* v. *Wilson* (6).

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(1) Law Rep. 2 H. L. 99.
(2) 1 Dr. & Sm. 363, 381 (a)
(3) Law Rep. 5 Eq. 249.
(4) Ibid. 2 Ch. 604.
(5) Law Rep. 4 Eq. 588; 3 Ch. 493.
(6) Ibid. 3 Eq. 122; 3 Ch. 682.
(7) Ibid. 2 H. L. 325.
(8) Ibid. 2 Q. B. 595.
(9) 1 Sim. 89.

(a) 17 Jur NS 132

Mr. *Jessel*, Q.C., and Mr. *Bardswell*, for the company:—

First: There was no such concealment of material facts in the prospectus as to entitle the Plaintiff to have his contract rescinded. It is the ordinary and well-known practice in getting up these limited companies for the promoters to provide the directors with qualification shares, and it has never before been suggested that such a matter ought to be stated in the prospectus. The promise to give *Sykes* paid-up shares was made as an inducement to him to give the benefit of his name and experience to the company, and had no reference to *Holden's* contract; the payments to *Cave* and *Walford* were made before they became directors, and long after the

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(1) 6 Ves. 625.
(2) Law Rep. 2 Ch. 604.
(3) Ibid. 2 H. L. 325, 352.
(4) Law Rep. 3 Ch. 493.
(5) Ibid. 5 Eq. 249, 263.
(6) Cr. & Ph. 1.

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contract had been made between *Holden* and the company. None of the directors had the slightest interest in *Holden's* contract, and it is evident from *Holden's* dissatisfaction with them that they have not favoured him at the expense of the company. The contract itself being set out in the articles to which the prospectus referred, the Plaintiff might have satisfied himself as to its fairness before he applied for shares; he has not produced any evidence in support of his allegation that it was unfair or extravagant, and he cannot be relieved of his shares on the ground of hypothetical motives, which may have influenced the directors in making it.

Secondly: The company having been ordered to be wound up, the rights of the creditors come in and prevent the Plaintiff from being removed from the register: *Oakes* v. *Turquand* (1). That case has overruled *Smith's Case* (2), unless the latter can be supported on the distinction taken by Lord *Cairns* in *Kent* v. *Freehold Land Company* (3), that the Plaintiff had not only filed his bill, but obtained an injunction before the winding-up. This Plaintiff might, if he had a case, have applied under the 35th section of the *Companies Act*, 1862, and, having chosen the longer process of a suit, he must take the consequence of the winding-up having occurred before the hearing.

Thirdly: The Plaintiff's delay is fatal to his suit. In these cases, having regard to the rights of other shareholders and creditors, a shareholder desiring to get rid of his shares must proceed with the utmost despatch: *Central Railway Company of Venezuela* v. *Kisch* (4); *Lawrence's Case* (5); *Kincaid's Case* (5); but here the Plaintiff did not file his bill for more than three months after he knew of the correspondence between *Holden* and *Sykes*.

Sir *Roundell Palmer*, Q.C., and Mr. *R. Hughes*, for the Defendant *Cave*; The *Solicitor-General* (Sir *R. Baggallay*), and Mr. *Eddis*, for the Defendant *Sykes*, and Mr. *Higgins*, for the Defendant *Walford*:—

In order to rescind a contract on the ground of *suppressio veri*, it must be shewn that the suppression is such as to make that

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(1) Law Rep. 2 H. L. 325.

(2) Ibid. 2 Ch. 604.

(3) Law Rep. 3 Ch. 493.

(4) Ibid. 2 H. L. 99.

(5) Law Rep. 2 Ch. 412.

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which is stated misleading: *New Brunswick and Canada Railway Company* v. *Conybeare* (1). But here the facts suppressed were irrelevant to the substance of the contract which the Plaintiff seeks to rescind, and a statement of them would not have in any way altered the effect of the statements made by the prospectus. The whole amount paid, or agreed to be paid, by *Holden* was less than the £30,000 which, by the 95th clause of the articles, he was to receive from the company for the transfer of the concession. The directors therefore had no interest in *Holden's* contract, and it could not concern any shareholder to know how *Holden* disposed of the £30,000, which was his own money. There was no impropriety in the transactions between *Holden* and the Defendant directors. The payments to *Cave* and *Walford*, and the promise of shares to *Sykes*, were made in each case before they became directors, and did not affect the interests of the company; but had it been otherwise, the Plaintiff's proper remedy would have been to institute a suit on behalf of himself and the other shareholders to recover the money paid to the directors for the benefit of the company: *Turquand* v. *Marshall* (2). The Court will not allow its rules, which were made for the prevention of fraud, to be wrested to the purpose of encouraging speculative *ex post facto* objections to a contract which has not turned out so well as one of the contracting parties expected. If the case of the Plaintiff fails against the company, he can have no relief against the directors, who have made no contract with him, either express or implied: *Kent* v. *Freehold Land Company* (3); *Ogilvie* v. *Currie* (4). In *Henderson* v. *Lacon* (5) the prospectus contained misrepresentations by the directors themselves.

[They also cited, upon the question of delay, *Peel's Case* (6).

Mr. *Marten*, in reply:—

In *Henderson* v. *Lacon* the decree was made after the winding-up order. If a winding-up order made after the filing of the bill were to be a bar to relief, Plaintiffs in all these cases would be obliged to apply specially to expedite the hearing of the suit,

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(1) 9 H. L. C. 711, 724. 8 Jur NS 575.
(2) Law Rep. 6 Eq. 112.
(3) Ibid. 3 Ch. 493.
(4) 37 L. J. (Ch.) 541.
(5) Law Rep. 5 Eq. 249.
(6) Ibid. 2 Ch. 674.

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which would lead to great inconvenience. As to the delay, the Plaintiff only discovered in August that *Holden* had paid the deposit and allotment money on *Sykes'* twenty-five shares, a comparatively small matter, which led to his subsequent discovery of the other more serious matters, of the concealment of which he complains. In *Lawrence's* (1), *Kincaid's* (1), and *Peel's* (2) *Cases*, the shareholders had neglected to inspect the memorandum and articles of association of which they complained as varying from the prospectus.

Dec. 15. LORD ROMILLY, M.R.:—

This is a case in which the Plaintiff prays that he may be relieved from his position of a shareholder in the *European Central Railway Company*, and that the contract between him and the company may be rescinded, and that his name may be removed from the register, and also that it may be declared that the Defendants are liable to return the payments he has made on account of his shares, and also to save him harmless, and indemnify him against all future payments on the shares.

The ground of the application is this, that the prospectus contained a false representation, which misled the Plaintiff—a false representation of a very serious description, not by stating that which was untrue, but by omitting the statement of that which was essential for the due understanding of the case. [His Lordship then stated the facts, and continued:—] The question is, whether the omission to state these circumstances which I have mentioned is sufficient to make the Plaintiff's contract void, and to entitle him to say that he was entirely deceived and taken in, and that therefore he was not bound to take these shares; in fact, whether it is such a fraudulent misrepresentation as entitles a person who took shares upon the faith of it to repudiate the shares. In the first place, I will take the case of Colonel *Sykes*. It was put very strongly that this was exactly the case of a trustee buying from a *cestui que trust*, in which the *cestui que trust* could put an end to the contract whenever he pleased, and that, at all events, the trustee could gain no benefit by it; but I observed at the time, and

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(1) Law Rep. 2 Ch. 412. (2) Law Rep. 2 Ch. 674.

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I think still, upon reflection, that that doctrine of law has nothing to do with this case. This is not the case of a contract between these two persons, but the question is, whether these circumstances are such as to seriously affect the probability of success of the undertaking, so that the fact of the company being got up without their being mentioned in the prospectus entitles a person who has taken shares to say: "If I had known these things, I certainly should not have taken the shares; and now that I know them, I am entitled to repudiate the shares." I think it is impossible to come to the conclusion that this was a purchase by a trustee from a *cestui que trust*, or to avoid the transaction on any such ground. The next argument that was put forward was this:—The directors gained certain profits, and they therefore have a profit out of the contract given to Mr. *Holden*. As they derived a profit from the contract, they cannot fairly and properly exercise their judgment for the benefit of their *cestuis que trust*. That is not exactly the way in which it was put in the 134th paragraph of the bill, which is to this effect: "The proposed contract price and other payments proposed and agreed to be made to the said *Howard Ashton Holden* were and are extravagantly great in comparison with the value of the works to be constructed for the said railway company in consideration thereof, and, in point of fact, the works of the said company might and could have been constructed at a much less price if the said chairman and directors had acted in good faith in the interests of the said company and the shareholders therein." Now, unquestionably, if the directors were to derive any profit from the contract, it might very seriously affect their judgment and behaviour as persons who were to control the contractor; but they were to derive no benefit at all from the contract. It is true that this fact is established, that *Holden* laid out £30,000, which he got from the company, in various measures for the purpose of floating the company. He was very anxious that the concession should be carried into execution, and expected to derive a very great benefit from it. Amongst the moneys so laid out by him were the two sums of money paid to Mr. *Cave* and Mr. *Walford*, and also the sums paid by way of deposit and on allotment in respect of the shares which Colonel *Sykes* had; for as to the promise of future paid-up shares, nothing was done in respect of that. But how does

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that give these persons an interest in the contract at all? I do not think that they derived any advantage from it whatever. The facts of the case very clearly shew that *Holden* did not think that they were lenient to him at all in respect of it; and whatever the profits made by the contract might have been, assuming that they were perfectly extravagant, nevertheless not one penny of those profits would have gone to Colonel *Sykes*, or to *Walford*, or to *Cave;* they would, all of them, have belonged to *Holden.* But, then, this paragraph says it was an improvident contract, a contract that ought never to have been entered into by reason of this, that the railway might have been constructed at a much less price. I must here observe that the concession belonged to *Holden*, and it was essential to make terms with him in order to get it, and one of the terms was that he should have the contract. The contract was to be a contract to be approved by Mr. *Bidder*. *Holden* sends in his proposal for the contract for £1,100,000 for making the railway, stating the surveys and the valuations he had made, and all the things that he had done for the purpose of ascertaining whether he could do it or not, and at what expense. All those are laid before Mr. *Bidder*. Mr. *Bidder* very properly says he did not verify one of them, because it is impossible that he could have done so. The expense would have been very great of making surveys and measurements, which was the only mode of verifying them: it would have taken a great length of time, besides involving great expense, which he was not authorized to incur; but judging from what he saw on paper, and assuming the surveys to be correct, he thought it a fair contract, and he so stated.

It is to be observed that there is not a tittle of evidence to shew that the contract is an unfair or improper one, and beyond the general allegations I have referred to there is no fact alleged in the bill to shew that the contract was unfair or improper, and the evidence rather seems to point in a different direction. Therefore this material allegation is unproved, and then the case resolves itself into the question, whether the fact of a director (I take Colonel *Sykes*' case first), receiving paid-up shares to qualify him from a stranger, or from a contractor to the railway, is such a circumstance as would induce a reasonable person to say the whole thing must fail, and entitle him when it was discovered to have

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his shares cancelled. What does it matter to him who paid for the shares? Colonel *Sykes*, from his position in the city of *London*, was supposed to be a person whose name was of great importance, and whose services would be of great value; he said, "I am willing to give you my name and my services, and I do not want any money; I will not take any money, but I must be saved harmless; I will not lose anything whatever; I will not spend any money." Paid-up shares are given to him, and actual money is paid, it is true, but not to him; but the bill does not complain of the £30,000 given to *Holden* for the concession and matters connected with it; that is no part of the complaint, nor, in point of fact, could the Plaintiff well complain of that transaction, considering how the matter has been stated upon the pleadings. Well, then, the Plaintiff had full notice of the contract; he knew exactly what the contract was; but he did not know, and that was all, that the qualification of Colonel *Sykes* had been paid by another person, in fact by the contractor. I asked Mr. *Marten* if he could give me any case in which the Court, in such a state of circumstances as that, had interfered to say that the whole transaction was fraudulent and void; but Mr. *Marten* very frankly admitted that there was no case of the sort, but merely suggested that as civilization advanced it was necessary to extend the rules of Equity to meet the new cases which arise every day. That was very properly answered by Sir *Roundell Palmer*, who said, that although it was extremely proper to enforce due fairness and perfect true dealing in all these matters to secure justice, you must not twist and pervert the rules of Equity so as to enable a dissatisfied person to get rid of his contract merely because he finds afterwards that he does not like it. That appears to me to be justly applicable to this case. I do not find anything against the company, that is, against the shareholders and creditors of this company, which would entitle this Plaintiff to have his name removed upon the discovery of these circumstances relating to Colonel *Sykes*.

Then come these other two cases; about £3000 each was paid to Mr. *Cave* and Mr. *Walford*, and I have to consider whether that would affect the validity of the allotment of shares to any other person. In my opinion it does not. It may be that this was money of the company, and that consequently these persons are liable to account to the company, and to the shareholders, for the money that they have improperly received. But it does not follow that because one of the directors has improperly received money from the company, therefore all the shareholders who have changed their minds can say, "Since we have discovered that we will get rid of the whole concern, and have nothing more to do with it." It would be very hard upon the other shareholders and the creditors of the company if such were the law, but such I do not conceive it to be.

With respect to those two payments of £3000 each to those gentlemen, I may observe that I do not mean to say whether they were proper or improper; that does not come before me; that may be a question between the *Financial Corporation* and the company, or it may be a question between this company and Messrs. *Cave* and *Walford*, whether they should refund the money, or whether they should be made liable to account; but I am quite clear as to this, that it is no reason for saying that the allotment of shares to other persons is void, and that a shareholder can get rid of his shares. That being so, the case against the company fails entirely.

Then the next question is this: if the Plaintiff is not entitled to recover against the company, is he entitled to say that these three Defendants must indemnify him for the loss he has sustained, and the sums which he may have to pay on the shares hereafter? I am of opinion that, in a case of this description, if he fails against the company he fails against the directors, and that it would be necessary to have a special and individual contract between the Plaintiff and the directors in order to make them liable to him. Where there is a privity between one of the directors and a stranger who proposes to take shares, it may be that that particular director is liable to him, and is bound to indemnify him for any false representations made to him, when the company are not liable, and he cannot get rid of his shares; but that is not the case here; it is not contended that there was any such privity, in fact there was none at all; the whole thing to be considered is, whether the circumstances which I have detailed will entitle him to get rid of his shares, because, if they do not, there is not a shadow of a personal contract which would entitle him to come against these individual directors.

That is, I think, sufficient for disallowing the equity claimed

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by this bill; but it is proper to observe that everything was known in August, 1866, for Mr. *Holden* and Colonel *Sykes* had some dissensions in July; and Mr. *Holden* said he had not received the support which he expected from Colonel *Sykes*, and therefore he begged to have his money repaid, and Colonel *Sykes* referred him to his solicitor. This correspondence became public in August, and thereupon the Plaintiff became perfectly well acquainted with it; but he did not file his bill until the 8th of December, so that there are three months at least, and a portion of two more, which he allowed to pass over without taking any step whatever. I am disposed to think that, even if he had a case, this would interpose a very serious difficulty. It is obviously of the utmost importance in these cases that a shareholder should come at the earliest opportunity, before other persons have entered into engagements with the company upon the faith of his being a member of it. The result is that, with all these circumstances put together, I think his case entirely fails, and I must dismiss the bill with costs.

Solicitors for the Plaintiff: Messrs. *Mason, Sturt, & Mason.*

Solicitors for the Defendants: Messrs. *Hughes, Masterman, & Hughes*; Messrs. *Fox & Robinson.*

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HOLT v. SINDREY.

Will—Illegitimacy—Personæ designatæ.

Post 178
6 Ch 312, -5, -7
9 Ch 147, -9
6 HL 272
7 HL 572
1 Ch D 646.
647.
3 Ch D 776

An illegitimate child, or illegitimate children *in esse* as a class, may take under a gift to a child or children as a class, if it appears certainly from the context, or proper evidence, that they are the persons meant by the word "child" or "children."

But illegitimate children unbegotten at the time of the testator's death, cannot under any circumstances be entitled under such a description.

Observations on *Pratt* v. *Mathew* (1), *Beachcroft* v. *Beachcroft* (2), and other cases.

William Holt, by his will, dated in 1827, directed his trustees, after the decease or second marriage of his wife, to stand possessed of so much of certain funds as would produce £35 a-year upon trust during the life of his daughter *Mary*, the wife of *John Lattimer*, for her sole use, exclusive of her then present or any future husband, and after the death of his said daughter to pay the same unto all and every the child or children of his said daughter begotten or to be begotten, in equal shares if more than one, and if there should be but one such child then the whole to be in trust for such one child, and to be vested in the same children when they attained twenty-one, or died under that age leaving issue. And in case there should not be any such child of his said daughter *Mary Lattimer*, or in case all such children (if any), should die under twenty-one without leaving issue, then the testator gave the fund in trust for other persons. The testator died in 1828. The widow of the testator died in 1831. Under a decree for the administration of the testator's estate the Chief Clerk certified that *Mary Lattimer*, then *Mary Holt*, spinster, on the 4th of May, 1817, married *J. C. Flenly*, but there was not any issue of the marriage, the said parties separating between twelve and one o'clock on the day of and soon after the ceremony, and never meeting again; that *J. C. Flenly* died in July, 1850; that on the 31st of January, 1818, *Mary Flenly*, as *Mary Holt*, married *John D. Lattimer*; and that there had been issue seven children, all of whom had attained twenty-one and were living. The whole were born prior to the death of *J. C. Flenly*, and while he was the lawful husband of *Mary Lattimer*. *John D. Lattimer* died on the 23rd of October, 1850. In 1858 a sum of £703 13*s.* 1*d.* Bank Annuities was carried over to the account of "The Legacy of *Mary Lattimer*, her Children, and their Incumbrancers," and the dividends were ordered to be paid to *Mary Lattimer* during her life. *Mary Lattimer* died on the 29th of August, 1868, without having had any lawful children, and this was a Petition by some of the parties entitled under the gift over, and who submitted that this fund became divisible among the persons under the will entitled in default of such children. The evidence shewed that the marriage between *J. C. Flenly* and *Mary Holt* was never consummated, that the marriage was without the knowledge or consent of her parents, and that four of the children of *Mary Lattimer* were born prior to the death of the testator (by whom they were well known and recognised as his grandchildren), and that three were born after his death.

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(1) 22 Beav. 328. 2 Jur NS 365 (2) 1 Madd. 430.

Mr. *J. Hinde Palmer*, Q.C., for the children of *Mary Lattimer*:—

The testator clearly referred to the children of the marriage with *Lattimer*, for he spoke of his daughter *Mary* as the wife of *Lattimer*. Although the children were illegitimate they were recognised and treated by the testator as his grandchildren, and he intended to place them in the same position as the children of his other daughters. The four children born before the death of the testator are clearly within the terms of the gift; but I feel a difficulty in contending that the three born afterwards are, because of the rule of law which invalidates gifts to future unborn illegitimate children: *Wilkinson* v. *Adam* (1), shews that a gift to children, although illegitimate, existing at the date of the will is good if it can be ascertained with sufficient precision that they are to take. Here it cannot be doubted that the testator intended these children to take, and I submit that though in the eye of the law there is the technical difficulty of illegitimacy, yet as they have been ascertained with sufficient precision, that difficulty will not prevent the Court from holding that the gift, so far as it concerns the four born before the death of the testator, is perfectly good. [*Howarth* v. *Mills* (2) was also cited.]

(1) 1 V. & B. 422.

(2) Law Rep. 2 Eq. 389-391. 12 Jur. N.S. 794.

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Mr. *Greene*, Q.C., and Mr. *Renshaw*, for the Petitioners and Plaintiffs in the cause:—

The testator supposed the marriage with *Lattimer* was lawful, and that he was making a provision for legitimate children. These children have not been properly described. The recognition by the testator, who did not speak of children of his daughter *Mary* by *John Lattimer*, ought to have been not only of the *status* of the children, but of the fact that he was aware of their illegitimacy. A mere recognition on a certain day would not be sufficient to bring them within the description in the will: *Jarman* on Wills (1). the words of the will are merely general, without reference to any children particularly. As the testator's daughter might have had legitimate children, and it was evidently contemplated that she might have a future husband, they would have taken this legacy to the exclusion of illegitimate ones, for whom there was no expressed intention to provide at all. The will ought to be construed as meaning the lawful children that the testator's daughter *Mary* might have, as his intention was to give to children of that class only. *Mary Lattimer* having had no legitimate child the limitations over came into operation. This was a gift to a class, and the law comprised within that term legitimate children only; illegitimate ones could not take with them unless there was something in the context which distinctly pointed out that they were to be included: *Harris* v. *Lloyd* (2); *Warner* v. *Warner* (3); *Re Davenport's Trusts* (4).

Mr. *Bagshawe*, Mr. *Fischer*, and Mr. *Langley*, for various Respondents in the same interest as the Petitioners, submitted that *Wilkinson* v. *Adams* (5) was a very different case to this one, and that the Court would not violate the settled principles of law by letting in illegitimate children to share with a class, some of whom might have been legitimate. There was nothing in the will which sufficiently designated these persons. The word "begotten," was not one of description. It did not do more than refer to the gift, which was one to a class. A mere possibility of there being legi-

(1) 3rd Ed. vol. ii. p. 204—207.

(2) T. & R. 310.

(3) 15 Jur. 141.

(4) 1 Sm. & Giff. 126. /17 Jur 31

(5) 1 V. & B. 422.

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timate children was sufficient to exclude illegitimate ones, and as it was quite possible at the date of the will that this daughter might have legitimate children, the gift to these children failed: *In re Wells' Estate* (1); *Pratt* v. *Mathew* (2); *Re Herbert's Trusts* (3); *Hawkins* on Wills (4); *Hart* v. *Durnand* (5); *Jarman* on Wills (6); *Godfrey* v. *Davis* (7); *Kenebel* v. *Scrafton* (8); *Coke* upon *Litt.* (9); *Owen* v. *Bryant* (10).

SIR JOHN STUART, V.C.:—

In order that any legatee—whether the legacy be to a class or to an individual—may take, it is necessary that the person or the class should be clearly described. Where a gift is made to a child or to children as a class the natural and proper meaning of the word "child" or "children" is legitimate child or legitimate children; but if the object of a gift is clearly described and clearly ascertainable from the words of the will, it matters nothing whether the object of the gift be legitimate or illegitimate, because an illegitimate child, or a number of illegitimate children as a class, if properly described, may be a legatee or legatees just as well as legitimate children. But in the construction of a will the primary and proper signification of every word is to be attributed to it. In this case it has been argued that the testator must be taken to have meant legitimate children only, and that as there are no legitimate children to answer the description this gift must altogether fail. I think it is perfectly clear upon the face of this will that the testator understood that his daughter *Mary Lattimer* was the wife of *John Lattimer*. It appears upon the face of the will that he believed her to be the lawful wife of *John Lattimer*. It also appears upon the face of the will, from his referring to children "begotten," that he knew there were in existence children born of the body of his daughter, and that they were known to him as children of this marriage. The fact that from an unknown circumstance that marriage was not a lawful marriage, though believed by the testator to be a lawful marriage; and the fact that from that unknown circumstance the children begotten of *Mary Lattimer* were, although the testator did not know it, illegitimate, seems to me to have nothing to do with the question whether they are or are not sufficiently described in the will.

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(1) Law Rep. 6 Eq. 599.
(2) 22 Beav. 328-334. 2 Jur. N.S. 365
(3) 1 J. & H. 121. 6 Jur. N.S. 1027
(4) Page 83.
(5) 3 Anstr. 684.
(6) Vol. ii. p. 204.
(7) 6 Ves. 43.
(8) 2 East, 530.
(9) 20 B.
(10) 2 D. M. & G. 697.

If there had been any legitimate children begotten of the body of *Mary Lattimer*, the description would properly apply to those children; but when it is an ascertained fact that there are no other children but the children begotten of the marriage with *Lattimer;* and when it is certain that children begotten of the testator's daughter are the objects of his bounty, and that there are none other to answer the description but the children of the marriage with *Lattimer*, I cannot say that these children were not clearly and properly described on the face of this will as the objects of the testator's bounty. The words of the will are in themselves intelligible construed in their natural sense by reference to what it is certain the testator knew, viz., that there were children begotten of the marriage of his daughter with *Lattimer.* In arguing a case of this description, some fallacies are produced by the use of two words, the proper construction of which requires a very accurate attention, and these words are "children" and "class." In some of the reports it is said that legitimate and illegitimate children cannot take together as a class. That is true in one sense, but it is wholly untrue in another, for if properly described as members of a class, there is no rule of law which says that legitimate and illegitimate children shall not take together. On the contrary, properly considered and understood, the same principle runs through all the cases, excepting the case of *Beachcroft* v. *Beachcroft* (1), in which Sir *Thomas Plumer* made a slip; and the case of *Fraser* v. *Pigott* (2), in which Lord *Lyndhurst* obviously misapprehended the true construction of the will.

The cases relied on by those who object to the validity of this gift as a gift to the children begotten of *Mary Lattimer* by her marriage with *Lattimer*, when properly understood, are authorities in favour of its being a gift to persons clearly ascertained and correctly described as the children begotten of his daughter, although those children were not legitimate. Take the words of

(1) 1 Madd. 430.

(2) You. 354.

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Sir *W. Grant* in *Godfrey* v. *Davis* (1), "No illegitimate child can claim under such a description;" that is, under the description of children "unless particularly pointed out by the testator, and manifestly and incontrovertibly intended, though in point of law not standing in that character." Why cannot an illegitimate child so claim? Simply because in the proper sense of the word "child," an illegitimate child is not a child. If, however, there is no other child than an illegitimate one to answer the description, and if there is, as Sir *W. Grant* says, a manifest and incontrovertible intention shewn to give to that child or to such children as a class, he or they must take, although in point of law not children in the primary sense. This consideration seems to me to shew clearly and satisfactorily that this is a valid gift by the description "of the children begotten" in the lifetime of the testator of the marriage of his daughter with *Lattimer*, although that marriage was not a lawful marriage. The law has long been established to this effect, and it is founded upon the principle which lies at the root of the construction of all instruments, viz., that the language used must be interpreted in its ordinary sense, unless there be something in the context to shew with certainty that another sense was intended. A child, when mentioned in a will, must be intended to mean a lawful child. As to the case of *Pratt* v. *Mathew* (2), that is an authority against the proposition for which it was cited; because if a testator gives a legacy to children he must mean lawful children, unless there is something to shew the contrary, and it is not enough to shew that he was married at the time to a person who could not be his lawful wife. In the case of *Counden* v. *Clerke* (3) (a well-known case upon another point) it is said, "so one may take by the name of son or daughter if he be so known, although there were no marriage between the father and the mother." Why is he to take as a son? Because he is known by that description. Why can the children begotten at the date of the will of the body of *Mary Lattimer* take in this case? Because they were known to the testator as the children of his daughter, and were properly described by him as the children begotten of his daughter.

(1) 6 Ves. 48.

(2) 22 Beav. 328. 2 Jur NS 365

(3) Hob. 32.

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9 Ch 154
9 CLD 777,

As to the rest of the gift to the children "to be begotten" it must fail, because every gift to an illegitimate child the begetting of which is contemplated is against the policy of the law.

It is not, however, against the policy of the law to permit a provision or gift to an illegitimate child begotten, but unborn, and I apprehend there is no doubt that a gift to the child of which a woman is *enceinte* at the date of the gift is a valid gift, although that child be an illegitimate child, because there can be no doubt about the object intended to be benefited.

The words "and if there should be but one such child, then the whole to be in trust for such one child," for a moment excited a doubt in my mind. But I think that by the word "such" is clearly meant a child who acquires a vested interest, and if none of the class had attained the age of twenty-one, the event would have happened which was contemplated, and to which the word "such" applies, and the gift would have failed, because it was not to vest till the age of twenty-one was attained.

Solicitors: Messrs. *Walters & Gush;* Mr. *Gedye;* Mr. *H. M. Phillips.*

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6 Ch 313,
6 HL 274

SAVAGE *v.* ROBERTSON.

Bequest to A., by her Maiden Name, and her two youngest Daughters—Illegitimacy.

Illegitimate children of an unmarried sister of the testator described in the will by her maiden name:—

Held, entitled to shares in a legacy to her "and her two youngest daughters."

H. W. ROBERTSON, by his will dated in October, 1865, bequeathed all his property thus:—"To my sisters *Mary S. Robertson* and her two youngest daughters, and *Blanch A. O'Malley* and her children, for her own sole and absolute use, each sister to receive an equal share and proportion."

Mary S. Robertson was, at the death of the testator in 1865, a spinster, but had three illegitimate children aged fourteen, thirteen, and nine years. They were baptized in and bore their father's

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name of *Piers*. They lived with *Mary S. Robertson*, and were reputed and treated in the testator's family as her children. *Mary S. Robertson*, in February, 1868, married *Benjamin Reeve*, but by him she had had no issue. *Blanch A. O'Malley* had only one child living, aged three years. This was a Petition praying that the rights of the parties in the fund might be declared.

Mr. *Eddis*, for Mrs. *O'Malley*, submitted that as the testator's sisters were living at his death they were entitled to this property in moieties absolutely.

Mr. *Langworthy*, for Mr. and Mrs. *Reeve* and her mortgagees:—

It is well settled that illegitimate children can take only as *personæ designatæ*. If, between the making of the will and the death of the testator, *Mary S. Robertson* had married and had had three legitimate daughters, the two youngest would no doubt have contended for a share of this property. The testator did not speak of the two youngest daughters then living of *Mary S. Robertson;* and wherever the general description in a will would include legitimate children, it cannot be extended to illegitimate children: *Godfrey* v. *Davis* (1); *In re Overhill's Trust* (2); *Bagley* v. *Mollard* (3). There is not sufficient in the will to indicate an intention to settle the shares: *De Witte* v. *De Witte* (4); *Bustard* v. *Saunders* (5); *Cunningham* v. *Murray* (6). The sisters take the property in moieties.

Mr. *Locock Webb*, for the children of Mrs. *Reeve*, submitted that it was quite clear that the two youngest were entitled to a moiety jointly with their mother.

Mr. *Graham Hastings*, for the child of Mrs. *O'Malley*, submitted that the property was divisible into thirds, and that it belonged to the two sisters and this legitimate child. As there might be legitimate persons to answer the description in the will, the Court would not admit two illegitimate daughters to take anything. Mrs. *Reeve* had married, and might have legitimate daughters. These illegi-

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(1) 6 Ves. 43.
(2) 1 Sm. & Giff. 362. 17 Jur 342.
(3) 1 Russ. & My. 581.
(4) 11 Sim. 41.
(5) 7 Beav. 92.
(6) 1 De G. & Sm. 366.

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timate daughters had not been sufficiently designated, and were consequently excluded: *Re Herbert's Trusts* (1); *Holt* v. *Sindrey* (2).

Mr. *Smart*, for the trustees.

SIR JOHN STUART, V.C.:—

The testator knew that these children were illegitimate, for he described his sister by her maiden name, and he intended to benefit the two youngest of these children. Children in existence are spoken of. The gift is not to a class, nor by general description, but to the two youngest daughters. The property must be divided into moieties, one of which must be divided between Mrs. *Reeve* and these two youngest daughters, and the other between Mrs. *O'Malley* and her child.

Solicitors: Mr. *Mardon*; Messrs. *Cattarns & Jehu*.

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(1) 1 J. & H. 121. 6 Jur NS 1027

(2) *Ante*, p. 170.

MIDLAND BANKING COMPANY *v.* CHAMBERS.

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1868
Nov. 24;
Dec. 8.

Creditors' Deed—Guarantee—Surety—Dividend on full amount of Debt.

A banker permitted a customer to overdraw his account upon having a limited guarantee from a surety, which provided that all dividends, compositions, and payments received on account of the customer should be applied as payments in gross, and that the guarantee should apply to and secure any ultimate balance that should remain due to the bank. The customer, when indebted to the bank more than the amount of the guarantee, compounded with his creditors, and the surety paid the amount of his guarantee:—

Held, that the bank was entitled to receive dividends upon the full amount of their debt until by means of such dividends and the amount received under the guarantee they should have been paid the whole sum due.

affd by L JJ 4 Ch. 398

THE Plaintiffs were bankers at *Sheffield*. In the year 1865 *Frederick J. Mercer*, one of the customers of the bank, applied to the Plaintiffs for leave to overdraw his account to a limited extent, to which the Plaintiffs agreed on condition that the Defendant, *John Thorpe*, should give to the Plaintiffs a guarantee to the extent of £300 in the terms of a printed form commonly used by the Plaintiffs in their business. Accordingly, the following form was filled up and signed by *J. Thorpe*:—

"Gentlemen.—In consideration of your opening an account with Mr. *F. J. Mercer*, and advancing to him at any time the sum of £300 at my request, I hereby guarantee to you the repayment of all moneys which shall at any time be due from him to you on the general balance of his account with you; and I hereby declare that this guarantee shall be a continuing guarantee to the extent at any one time of £300, and shall not be considered as wholly or partially satisfied by the payment or liquidation at any time or times hereafter of any sum or sums of money for the time being due upon such general balance as aforesaid, but shall extend to cover and be a security for every and all future sum and sums of money at any time due to you thereon, notwithstanding any such payment or liquidation. And I further declare that you may grant to the said *F. J. Mercer*, or

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to any drawers, acceptors, or indorsers of bills of exchange or promissory notes received by you from him, any time or other indulgence, and compound with him or them respectively, without discharging or satisfying my liability, and that all dividends, compositions, and payments received from them or him respectively shall be taken and applied as payments in gross, and that this guarantee shall apply to and secure any ultimate balance that shall remain due to the said company; and I further declare that this guarantee shall continue to be binding notwithstanding any changes that may from time to time take place in the shareholders in the said *Midland Banking Company, Limited.*" On the faith of this guarantee the Plaintiffs allowed *Mercer* to overdraw his account.

At the end of the year 1865 *F. J. Mercer* became unable to meet his financial engagements; and on the 6th of January, 1866, he executed a deed of assignment of all his estate and effects to the Defendants, *Thomas Chambers*, who was at that time the manager of the Plaintiff's bank, and *John Thorpe* the guarantor, in trust for the payment of debts, and then to be applied for the benefit of the creditors in like manner as if the debtor had been adjudged a bankrupt, and the surplus, if any, to be paid to the debtor or his representatives. The deed was registered under the 192nd sect. of the *Bankruptcy Act*, 1861. The balance due to the Plaintiffs on their account with *F. J. Mercer* at the date of the before-mentioned deed was £410 4*s.* 11*d.*; but on the 30th of May, 1866, the Defendant *Thorpe* paid to the Plaintiffs the £300 for which he was liable under the guarantee, and by such payment the debt due to the Plaintiffs from the estate of *Mercer* was reduced to £110 4*s.* 11*d.*

The bill prayed that the trusts of the deed of assignment might be administered under the direction of the Court, and that the Plaintiffs might be declared to be entitled to a dividend out of *Mercer's* estate upon the whole amount due at the date of the execution of the deed, irrespective of any sums recovered from the surety. The trustees of the deed, on the other hand, refused to admit the Plaintiffs' claim, insisting by their answer that the Plaintiffs were entitled to a dividend on so much of their debt only as still remained unsatisfied after receiving the £300 from

J. Thorpe in discharge of his guarantee. It appeared that, in fact, *J. Thorpe* had taken a mortgage, by way of counter security, at the time of his giving the guarantee, and that upon the winding up of the estate of *F. J. Mercer* the mortgage security was realized, and the £300 was paid over to the Plaintiffs by *J. Thorpe* in discharge of his guarantee; but it was at the time stated by the Plaintiffs to the trustees of the deed of assignment that their receipt of this sum was to be regarded as in no way prejudicing or interfering with the position occupied by the Plaintiffs against the estate of *F. J. Mercer*, in respect of which they were to stand as if such sum of £300 had not been received by them.

Mr. *De Gex*, Q.C., and Mr. *Bristowe*, for the Plaintiffs :—

The form of guarantee signed by Mr. *Thorpe* was expressly intended to meet a case like the present. It was drawn with great care, for the purpose of enabling the bankers to prove for the whole amount of their debt, and receive a dividend upon the whole, notwithstanding they may have received from the surety a portion of the debt. The question is therefore of material importance to the Plaintiffs and many other bankers who have adopted the same form of guarantee. The case must be treated as if it arose in Bankruptcy, and in an ordinary case the rule is, that where there is a security from a third party the creditor may prove against the estate of the debtor for the full amount of the debt, and receive a dividend upon the whole, notwithstanding he will be bound to pay a portion of the dividend to the surety in regard to the sum which has been advanced by him. But that right of the surety to a proportionate part of the dividend may be waived by special contract, and it is submitted that this form of guarantee is sufficient for the purpose. In *Ex parte Hope* (1), and in *Ex parte Miles* (2), there were contracts intended to have the same effect as this, and in both those cases it was held that the surety had contracted himself out of the general principle. In this case he has done the same thing in a more simple way. The proviso here used by the bankers is quite as effectual as that upon which those two cases were decided. We have received £300, but we are entitled to go on receiving such dividends upon the whole of our debt as *Mercer's*

(1) 3 M. D. & D. 720.

(2) 1 De G. 623.

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estate may be able to pay until, with the £300, we shall have received the whole sum due.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the Defendants:—

It is an inflexible rule that no creditor on a bankrupt's estate shall prove for his debt without deducting the value of the security held by him. This was decided in the case of *Ex parte Holmes* (1), where *A. B.* gave his acceptance to a person, who deposited it with his bankers to secure a floating balance, and then became bankrupt. The bankers proved a larger debt, and received a dividend out of the estate. The Lord Chancellor, in reversing the decision of the Court of Review, held that *A. B.* was entitled to participate in the dividend; and so in *Thornton* v. *M'Kewan* (2), where a guarantee was given to a limited amount for a man who became bankrupt, it was held that the guarantor was entitled to the benefit of a proportionate part of the dividend on the amount guaranteed, notwithstanding the unpaid debt greatly exceeded the amount of the guarantee. Those cases, and *In re Plummer* (3), only followed the decisions in *Ex parte Rushforth* (4) and *Paley* v. *Field* (5); and the same principle was recognised as the rule in Bankruptcy in *Kellock's Case* and in *In re Xeres Wine Company* (6), although it might be different under a winding-up. This case, it is admitted, must follow the rule in Bankruptcy, and there is nothing in the terms of the guarantee signed by the surety which can oust that general rule.

Mr. *De Gex*, in reply.

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Dec. 8. SIR R. MALINS, V.C.:—

The question to be decided is, whether the Plaintiffs are entitled under the deed of May, 1866, to receive a dividend upon the whole of their debt as it stood at the date of the execution of the deed, or upon the amount as reduced by the payment of the £300.

(1) 1 Mont. & Ch. 301.
(2) 1 H. & M. 525.
(3) 1 Ph. 56.
(4) 10 Ves. 409.
(5) 12 Ibid. 435.
(6) Law Rep. 3 Ch. 769.

It was agreed by the learned counsel on both sides, that the question must be decided as in Bankruptcy, and that the rights of the Plaintiffs are the same as if *Mercer* had become a bankrupt, and they had, on the 6th of January, 1866, proved a debt of £410 4*s.* 11*d.* against his estate. The rules in Bankruptcy are well settled, that if a creditor holds a security upon any part of the bankrupt's estate, he must realize or give credit for the value of the security, and prove for the balance only; but where there is a security from a third party, the creditor is entitled to prove against the estate of the debtor for the full amount of his debt without reference to his security, and to receive a dividend upon the whole; but he will, in the absence of contract to the contrary, be bound to pay to the surety so much of the dividend as is referable to the amount received under the guarantee. Those points are settled by *In re Plummer* (1), *Ex parte Rushforth* (2), *Ex parte Holmes* (3), and *Thornton* v. *McKewan* (4), and many other cases. But the right of the surety to stand in the place of the creditor as to the dividend upon the amount paid by him, may, by contract, be waived in favour of the creditor until he has received the full amount of his debt, and the question is, whether it has been so waived by the terms of the guarantee in the present case. The case relied upon by Mr. *De Gex* for the Plaintiffs, *Ex parte Hope* (5), was a guarantee given to a bank in favour of a particular customer, and the guarantee—being, like the present, a running guarantee, to the extent of £10,000—contained a clause providing that any dividend should be applied in the first place towards the satisfaction of so much of such balance as should exceed in amount the sum of £10,000, without the sureties or any of them, their or any of their heirs, executors, or administrators, being entitled to the benefit of such dividends, compositions, or other payments or sums of money, or any part thereof respectively, until the whole of such excess of the said banking account should be fully discharged. That was a petition by the assignees asking to have the amount of the proof reduced. The case was argued before the then Judge in Bankruptcy, Vice-Chancellor *Knight*

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(1) 1 Ph. 56.
(2) 10 Ves. 409.
(3) 1 Mont. & Ch. 301.
(4) 1 H. & M. 525.
(5) 3 M. D. & De G. 720.

Bruce, and the petition was dismissed. In *Ex parte Miles* (1) the same point arose. That was the petition of sureties praying to be admitted to stand in the place of a creditor who had proved for the amount of the debt secured. But in that case also, the guarantee being a running guarantee for £600, there was a stipulation that such dividends received should not go or be taken as in discharge of any part of this guarantee, but the company should be entitled to recover on the guarantee to the full extent of the £600, notwithstanding any such dividends. Vice-Chancellor *Knight Bruce* said he considered the claim made by the Petitioner inconsistent with the proviso in the guarantee, the creditors not having yet received 20*s*. in the pound, and His Honour dismissed the petition without prejudice to a subsequent application in the event of the creditor being paid in full.

Those are, both of them, cases in which the surety bargains with the creditor that the creditor shall be paid in full before the surety shall be entitled to receive anything in respect of the dividends; or, in other words, the guarantor shall not be entitled to participate in the dividends until the creditor has been paid in full. In the present case, although it was strongly argued by Mr. *De Gex* that the words were equally strong, I cannot quite go with him in that. I do not think the words are so express and distinct as in the two cases to which I have referred, but I am of opinion that they have the same effect. The words are: "That all dividends, compositions, and payments received from them or him respectively shall be taken and applied as payments in gross." Now, it is perfectly clear this was introduced for some particular purpose, because the general rule, as I have already stated, in the absence of stipulation, is, that *quoad* the £300, *Thorpe*, the creditor, would be entitled to stand as to dividends in the place of the bank. It is introduced therefore for the purpose of ousting that rule, and therefore it was to be taken as payment in gross. If it stopped there, there might have been some difficulty; but it goes on, "and that this guarantee shall apply to and secure any ultimate balance that shall remain due to the said company." Therefore, upon the language, I think it plain that the intention was that, whatever dividend the bank were to receive they were to receive in full, and

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(1) 1 De G. 623.

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they were entitled to receive from *Thorpe* the £300 also until they should be paid in full. The circumstance that the surety *Thorpe* obtained the £300 by means of a counter security given to him by *Mercer* does not, in my opinion, make any difference in the rights of the parties. That was a circumstance alluded to by Vice-Chancellor *Knight Bruce* in *Ex parte Hope* (1) as being immaterial. The result is, that the Defendants are, in my opinion, wrong in the contention raised by them in their answer. There must be a declaration that the Plaintiffs are entitled to receive dividends on the full amount of their proof, £410 4*s.* 11*d.*, until, by means of such dividend and the £300 received from the Defendant *Thorpe*, they shall receive the full amount of their debt.

I do not see that I can relieve the Defendants from the payment of the costs. The amount involved in this case is but small, but it was argued before me as a case of general application to these banking guarantees.

Solicitors for the Plaintiffs: Messrs. *Sole, Turner, & Turner.*
Solicitors for the Defendants: Messrs. *Singleton & Tattershall.*

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Nov. 19.

[illegible]

Injunction—Suit in Divorce Court—Condonation of Adultery—Separation Deed.

Upon motion by a wife for an injunction to restrain her husband from proceeding in the Divorce Court to obtain a dissolution of marriage, on the ground of a contract by the Defendant to condone all former causes of complaint, and not to take legal proceedings in respect thereof:—

Held, that as the contract might be set up by way of defence in the Divorce Court, and as it was executed by the husband in ignorance of the fact that his wife had committed adultery, and on her positive assertion of innocence, this Court would not interfere to stay proceedings in the Divorce Court.

THIS was a motion on behalf of the Plaintiff, *Louisa Marie Brown*, the wife of the Defendant, *Colonel David Brown*, for an injunction to restrain any further proceedings by the Defendant, *Colonel Brown*, in the Divorce Court, with the view of obtaining a divorce

(1) 3 M. De G. & D. 720.

from the Plaintiff upon the ground of adultery committed by her. The Plaintiff and Defendant were married in *India* in July, 1861, where they cohabited till February, 1865. During that time the Defendant entertained great suspicion as to his wife's conduct, which led to his ultimately sending her home from *India* in 1865. The Defendant himself remained in *India* from 1865 to 1868, when he returned to *England*, and during those three years he received letters and communications shewing that his wife, while residing in *England*, had been guilty of great levity of conduct, which raised the strongest suspicion in his mind. There were, however, letters written by her to her husband, which satisfied him that no criminal act had taken place after she left *India*, and among the letters was one written by her on Christmas Day, 1867, whilst she was in *Edinburgh*, telling him that she was very unwell, but leading him to believe that her illness was of an ordinary character. After the return of the Defendant to *England* in April, 1868, he resumed cohabitation with his wife, and again became exceedingly dissatisfied with her conduct towards him, and her conduct with other persons. This led to remonstrances, and he separated from her in the month of June, 1868. A correspondence then took place, and a letter, dated the 16th of June, was addressed by the Plaintiff to her husband, in which she gave him the most solemn assurance, "in the presence of her God," that she had never been guilty of any criminal act; and upon the faith of that assurance he resumed cohabitation with her. Shortly afterwards her conduct was still so unsatisfactory that they again separated, and finally a deed of separation was executed on the 14th day of July, 1868, containing the following stipulation:—

"That no proceedings shall be commenced or prosecuted by or on behalf of either party against the other in respect of any cause of complaint which now exists, or has arisen before the date of these presents; and every offence (if any) which has been committed, or permitted, by either party against the other shall be considered as, and the same is, hereby forgiven and condoned, and, in case either party shall hereafter commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise, no offence or misconduct which has been committed, or permitted, before the execution of these presents, and no act, deed, neglect, or default of either party in or relating to any such offence or misconduct shall be pleaded or alleged by either party, or be admissible in evidence."

Notwithstanding that contract, *Colonel Brown*, on the 13th of August, 1868, that is, about four weeks after the execution of the deed, commenced a suit against his wife for a divorce on the ground of adultery, which suit was still pending in the Divorce Court. The motion for an injunction to restrain the prosecution of that suit was founded on the before-mentioned deed, which was put forward as a ground for restraining the Defendant from committing any violation of the express terms of the deed. The Defendant, by his answer, stated, that at the time of executing the deed of separation he had no reason whatever to suppose that in the interval between the return of the Plaintiff from *India*, in 1865, and his own return in April, 1868, the Plaintiff had committed adultery, and he executed that deed in the belief that during that period the Plaintiff had done nothing whatever which could enable him to obtain a divorce or judicial separation from her. The Plaintiff well knew that he executed that deed in the belief aforesaid, and she concealed from him the fact that she had had a miscarriage in December, 1867. She frequently protested to the Defendant that she had always been faithful to him, and he executed the deed in the belief that, whatever might have happened in *India*, she had been faithful to him since she had left that country.

The evidence in support of the statement in the answer that the Plaintiff had had a miscarriage in *Edinburgh* in the year 1867, was an affidavit by the medical practitioner who attended her on the occasion.

Mr. *Cotton*, Q.C., and Mr. *Ferrers*, for the Plaintiff:—

The contract entered into by the husband in July, 1868, is a positive condonation of all acts committed by the Plaintiff previously to that time, and a covenant not to take legal proceedings in respect of such acts. The Court will interfere by injunction to restrain the prosecution of a suit in the Divorce Court: *Hunt* v. *Hunt* (1); *Rowley* v. *Rowley* (2).

(1) 31 L. J. (Ch.) 161.

8 Jur N S 85.
4 De G F J 221

(2) Law Rep. 1 H. L. Sc. & D. 63.

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[The VICE-CHANCELLOR suggested that this deed might be pleaded in the Divorce Court in opposition to the suit for a divorce.]

The judgment in the case of *Hunt* v. *Hunt* (1) is an answer to that suggestion. The Lord Chancellor there says that the Court of Divorce will not recognise a deed of separation, nor permit it to be pleaded in bar of a suit for restitution; and unless the covenant can be enforced in a Court of Equity, a deed of separation may be annulled at the pleasure of either party. If the Defendant alleges fraud for the purpose of setting aside this deed, then it is necessary for him to institute a cross suit, as was decided in *Eddleston* v. *Collins* (2).

Mr. *Glasse*, Q.C., and Mr. *Lindley*, for the Defendant:—

The principal ground of opposition to this injunction is, that the Plaintiff comes here to ask the Court to enforce a deed which she procured by her own fraud. The Defendant executed the deed when ignorant that she had been guilty of adultery after she left *India*, and on her assurance of innocence, and yet at the very time she knew that she had committed adultery. She does not deny the allegation made by the answer, since there is no amendment of the bill; therefore she does not come to the Court with clean hands. It is said that you cannot set up a defence of fraud, except by a cross bill; but in *Reg.* v. *Saddlers' Company* (3) Mr. Justice *Willes* said (4): "A judgment or decree obtained by fraud upon a Court binds not such Court, nor any other; and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding." It is alleged that he suspected the adultery in *India*. But if he knew of such a crime, and condoned it, still that is no condonation of the subsequent adultery in *England*, of which he was totally ignorant.

Condonation is conditional upon the full knowledge of all the facts: *Dempster* v. *Dempster* (5). So also as to a release; *Lyall* v. *Edwards* (6). *Hunt* v. *Hunt* was taken on appeal to the House of Lords, but was never decided, in consequence of the death of Mrs. *Hunt*.

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4 DeG F&J 221
(1) 31 L. J. (Ch.) 176. 8 Jur NS 85
(2) 3 D. M. & G. 1. 17 Jur 331
(3) 10 H. L. C. 404. 9 Jur NS 1081
(4) 10 H. L. C. 431. 9 Jur NS 1086
(5) 31 L. J. (P. & M.) 20. 8 Jur NS 44
(6) 6 H. & N. 337.

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The Plaintiff has no right to come to this Court if there is a good defence at Law: *Hardinge* v. *Webster* (1).

Mr. *Cotton*, in reply.

SIR R. MALINS, V.C.:—

The motion for an injunction to restrain any further proceedings by the Defendant in the Divorce Court is rested on the deed of separation, which, it is contended, is conclusive against such proceedings being allowed by this Court to be continued. The Defendant, on the other hand, swears that he executed the deed on the faith of the truth of the statement made by the Plaintiff that she had never been guilty of adultery. Information was, however, conveyed to him, which led to his subsequently making inquiries; and it turns out that this lady, who had pledged—not her oath, for she did not swear it—but her word, "in the presence of her God," that she had never been guilty of adultery, had on the 29th of December, 1867, four days after she wrote the letter addressed to him in *India*, had a miscarriage, he having been more than three years absent in *India*. It is, therefore, not attempted to be denied that at the very time she gave these very solemn assurances of her innocence to her husband she knew that she had been guilty of adultery; and in giving him those assurances she was guilty of making as fraudulent a representation to her husband as one human being was ever guilty of making to another.

Now, under the circumstances, it is said that this deed nevertheless is conclusive, and so conclusive that I, sitting in a Court of Equity, am bound to restrain any proceedings of the husband with the view of obtaining a divorce from a wife who has not only been guilty of adultery, but has given her husband such solemn assurance of her innocence; and that I am bound to interfere in her favour, because to allow him to go on with those proceedings would be to allow him to commit a violation of his express contract.

The first point which I suggested to the learned counsel for this lady was, that if this deed is a binding deed, it can be pleaded in the Divorce Court. I have always understood that in all proceedings by a husband or wife—for instance, in the case of

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(1) 1 Dr. & Sm. 101; 6 Jur NS 88

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a proceeding by a husband to obtain a divorce *à vinculo* from his wife on the ground of adultery—if it can be shewn that a condonation has taken place, there is an end of the proceedings of the husband. But it must be a condonation of a known fact, and, therefore, the act of the husband, if it amounted to a condonation in case of his being aware of the adultery, can have no operation when he was in total ignorance of it. Now, if this husband had been aware of his wife's adultery, it can admit of no shadow of doubt, in my mind, that if that be shewn to the Court, the deed which he has executed is a complete and final bar against his taking any proceedings in that Court, because he has contracted with her that "every offence which has been committed, or permitted, by either party against the other shall be considered as, and the same hereby is, forgiven and condoned." The deed, therefore, is perfectly conclusive in the Divorce Court, if it is a binding deed. I was at first inclined to take the view that probably this deed must stand until it was set aside, and that it was necessary for the husband to file a bill to set aside the deed as having been obtained by fraud or misrepresentation—suppression being misrepresentation, but there was not merely suppression here. If this lady had been guilty of adultery, and had led her husband to believe she was innocent, she knowing all the time that she had been guilty of adultery, that would, at all events, have been suppression. This is a positive statement. He swears that but for that assertion he would never have executed the deed, and therefore this is a deed into which he was induced to enter by positive misrepresentations—that is, by a positively false statement on her part.

Then, if this is a deed which is binding, it clearly can be pleaded in the Divorce Court. But if it is not binding, is there any process by which it can be got rid of in this Court? First of all, with regard to the propriety of this Court interfering to restrain proceedings in the Divorce Court. The counsel for the Plaintiff rely upon the case of *Hunt* v. *Hunt* (1), in which Lord *Westbury*, overruling the Master of the Rolls, decided that where parties have entered into a contract to do or not to do certain things, and they proceed to act in contravention of those stipulations in the Divorce Court, this Court will interfere to prevent them by injunction.

(1) 31 L. J. (Ch.) 161. 8 Jur NS 85
4 DeG F&J 221

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Whatever my private opinion may be, of course I must take the law from the Lord Chancellor, although I may concur with the Master of the Rolls, whose decision was overruled; but I am told, as a matter of fact, that there was an appeal to the House of Lords, and I am informed that no judgment was ever given, in consequence of the death of one of the parties, Mrs. *Hunt.* I cannot tell what the House of Lords might have done, and I must assume, for the purpose of my present decision, that it is within the jurisdiction of this Court to restrain proceedings in the Divorce Court in contravention of the terms of a deed of separation, though I confess I can see no impropriety in such proceedings being taken, because all these things can be made a defence in that Court.

I quite accede to the argument, that if a man proceeds to recover a debt at law which has been released, you do not come to this Court to prevent him from suing at law in contravention of his release, because the release can be used in the Court of Law. Acting upon that principle my learned predecessor, Sir *Richard Kindersley,* in the case to which I have been referred of *Hardinge* v. *Webster* (1), refused to interfere in a case of that kind. I have also a distinct recollection of a case in which an application was made to me with regard to Colonel *Berkeley's* debts soon after I became Vice-Chancellor, and the application was that I should stay proceedings in the Bankruptcy Court upon the ground that a deed had been executed which released the Defendant's debt. The decision in that case was a very important one, involving an enormous amount of debt, £700,000; and therefore I may assume it was a case in which if the parties had thought there was any hope of altering my decision on appeal they would not have omitted the opportunity of appealing, and as there has been no appeal, I must assume that my decision was correct. The view which I took was, that it was unnecessary for this Court to interfere, because if the deed was a release it was equivalent to payment, and when an application was made to the Bankruptcy Court, that deed could be put in as a defence, and therefore I dismissed the motion. So in this case: if this deed can be used as a defence in the Divorce Court, it will be a conclusive answer to the application of the husband for the divorce which he seeks.

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(1) 1 Dr. & Sm. 101. 6 Jan 1868

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But then it has been said that in the Divorce Court the validity of this deed cannot be entered upon. It appears to me to be perfectly plain that in order to be a condonation the offence must be a known fact, and there can be no condonation of an unknown fact. Accordingly the case of *Dempster* v. *Dempster* (1), which has been cited, goes exactly to the point. In that case, where the wife was suing her husband for dissolution of marriage on the ground of cruelty and adultery, it was said that she had condoned, and it turned out that she had condoned the cruelty, because that was a thing she must have known, since it was cruelty practised towards herself, but of the adultery she was in ignorance; and although she had condoned the cruelty, it was held that that was no condonation of the adultery of which she was ignorant. Condonation may be shewn by various circumstances. It may be shewn by conduct, such as resuming cohabitation, and various other acts, but you cannot have a more solemn condonation than under the hand and seal of the party, where it is expressly agreed that everything shall be "forgiven and condoned." But if that condonation has taken place in ignorance (which will be the reply of the husband), why should not that circumstance of ignorance under which the condonation took place be just as much open to inquiry in the Divorce Court in this case as it was in the case of *Dempster* v. *Dempster*, where it was held to be no answer to the application of the wife. So in the case of *Rowley* v. *Rowley* (2), which has been cited, the whole question was investigated in the Divorce Court, as I am satisfied it can be investigated in the present case.

It is not an unimportant circumstance that this bill, having been filed in September, is answered on the 7th of November, and that in this answer the husband swears that his wife has been guilty of adultery, that he was ignorant of that fact when he executed the deed, and that if he had known it he would not have executed the deed; this notice of motion was given two days afterwards, with the knowledge that the answer had been filed; and there is no amendment of the bill to negative those charges, and indeed the case comes on with the admission that she has been guilty of adultery, and the proof that she had given her husband solemn assurances that she had not been so guilty.

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(1) 31 L. J. (P. & M.) 20.

8 Jur NS 44
4 DeG F & J 221

(2) Law Rep. 1 H. L. Sc. & D. 63.

Therefore, being of opinion, first, that this deed can be used as a defence in the Divorce Court; and being of opinion, secondly, that a party coming into this Court to ask for its interference to prevent legal proceedings, whether they be proceedings to recover a debt by an action at law, or to enforce any right in the Court of Divorce, must come with clean hands, and must come with a case entitling him to call upon a Court of Equity to interfere, I am distinctly of opinion that this lady, coming here upon an admission that she obtained this deed by one of the grossest misrepresentations and falsehoods that could possibly be committed, does not come into this Court under circumstances which can justify me in any way in interfering on her behalf, and upon that ground, also, the motion must be refused.

It has been strongly urged that this gentleman must be considered as having known that she had been guilty of adultery, and the topic which has been most strongly urged upon me is, that he had such suspicion that she had committed adultery in *India* as almost to amount to certainty, and that he believed it. Now, I will assume that he knew that she had committed adultery in *India*, and with that knowledge he resumed cohabitation with her on his return from *India*. That was an absolute and conclusive condonation of all that had taken place before. But if he did condone that adultery of which he was aware in *India*, is that any license to her to commit adultery after he resumes cohabitation? Certainly not, and no one will contend it. If, therefore, taking a merciful view of her conduct, he condoned her adultery when he resumed cohabitation with her in April last, believing that she had been guilty of adultery in *India*, is that any pardon of her having done the same when she was in *England?* My own opinion is, that he might have had strong suspicions she had committed adultery in *India*, but the suspicions were removed by her positive assurances. Husbands are apt to believe what their wives tell them, and although this lady had been guilty of so much levity, yet when, in that sacred confidence which subsists between husband and wife, she assured him that she had not been guilty of adultery, he was entitled to believe her. I think he disbelieved that she had been guilty of adultery in *India*, but even if he did believe it, that can afford her no excuse for adultery in *England*.

I am satisfied, upon the evidence of her own letter, that this deed was executed in the belief of the truth of her solemn assurance, that not only in *India*, but during no part of her married life, had she been guilty of any impropriety. In the belief of her solemn assurance that she was in this respect an innocent woman, he executed this deed, and upon every principle of this Court I am bound to come to the conclusion that a deed executed under such a misrepresentation of facts cannot stand, and certainly can give the party who has been guilty of that fraud or misrepresentation no title to come and ask for the assistance of this Court.

In my opinion, therefore, upon every ground this motion entirely fails, and must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Maynard, Son, & Co.*
Solicitors for the Defendant: Messrs. *Morris, Stone, & Co.*

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1868
Nov. 14, 16.

BEATY *v.* CURSON.

Trustee Relief Act—Payment into Court—Deduction for Costs.

Where a trustee pays money into Court under the *Trustee Relief Act*, and has incurred costs which he claims to deduct from the fund, but which are disputed, his proper course is to pay the whole fund into Court without deducting such costs, leaving the Court to decide the amount of costs to which he is entitled.

Therefore, where a trustee paid money into Court after deducting a sum for costs and expenses which the Court deemed excessive, the Court, on bill by the *cestuis que trust*, ordered him to make good the whole of the trust fund in Court, and to pay the costs of the suit; the trustee to be allowed such costs as he was properly entitled to when the fund in Court came to be dealt with.

In 1855, a sum of £1065 consols was transferred to two trustees upon certain trusts, in pursuance of which they paid the income to the two tenants for life for several years. One of the trustees having died in 1858, the surviving trustee, the Defendant, *John Curson*, continued to pay part of the income to the tenants for life, and applied the remainder of the income to other purposes to which he alleged that it was applicable.

In 1862, *John Curson* expressed his desire to retire from the trust, and two new trustees were fixed upon, but when the appointment was about to be made, he claimed to deduct from the trust fund £48. 16*s*. 4*d*. for the costs of his solicitor, and £7. 10*s*. for his own personal expenses relating to the trust fund. The new trustees declining to receive the fund with these deductions, *John Curson* deducted those amounts, and paid the residue of the fund into Court under the *Trustee Relief Act*.

By his affidavit upon paying the fund into Court, *John Curson* stated as his ground for so paying it in, that he was seventy-four and unable to attend to the trust; that on the appointment of the proposed new trustees, his solicitors had prepared a deed of appointment and release in respect of the trust matters, but disputes having arisen between the parties interested in the matters of the trust such deed had remained unexecuted; and he also stated the deductions he had made for his solicitors and his own personal expenses.

The Plaintiff alleged that *John Curson* was not justified in paying the fund into Court, and that the sole reason of his doing so was, that the new trustees refused to allow the deduction for costs and expenses, which were unreasonable and excessive; and asked that *Curson* might be ordered to make good the full amount of the trust fund.

The question turned upon the deductions which had been made for costs, which were said to have been incurred in connection with some hostile claim to the trust fund.

Mr. *Bevir*, for the Plaintiffs, the persons interested in the fund, referred to *In re Bloye's Trusts* (1), and insisted that the payment in was vexatious and improper.

Mr. *Phear*, for the Defendant, contended that it was the usual practice on paying money into Court to deduct all costs which had been incurred in connection with the trust.

SIR R. MALINS, V.C. :—

Although the amount in question is small, yet very important questions arise in this case as to the duties of trustees on paying money into the Court under the *Trustee Relief Act*.

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(1) 1 Mac. & G. 488.

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There was no obstacle to the retiring trustee transferring the trust fund into the hands of the new trustees, except the claim for a release, and for costs, amounting to £56, which, considering the amount of the fund, strikes me as being very exorbitant.

The question I have to decide is, whether when the disputes as to these deductions arose, and where there was no object in payment into Court, the trustee had a right to deduct them, and pay the balance into Court, and thus be his own taxing master.

In the great majority of cases where no costs are incurred except those incident to the payment into Court, the trustee deducts his costs, and pays in the residue of the fund; and even in such cases trustees would do well to see that the deductions are not objected to, as they know that the amount can be challenged when the fund paid in is disposed of by the Court; and the trustee should be very careful not to deduct too much, and should give notice to the parties interested of the amount he proposes to deduct. But where a trustee knows that the amount of the costs he proposes to deduct is contested, I am of opinion it is his duty to pay in the whole amount, leaving the Court to decide the amount of costs to which he is entitled. Had Mr. *Curson* done so in this case, a Petition would have been presented by the tenants for life for payment of dividends, when he would have appeared and asked for his costs, which the Court would have ordered to be taxed, and paid to him.

Under the circumstances of this case, I am of opinion that Mr. *Curson* ought to have paid in the whole fund, and he must be decreed to pay in such a further sum as will make good the whole trust fund in Court. It appears that he was well advised not to pay the fund into Court; but, disregarding that advice, he, by paying the fund in, has rendered the suit necessary, and therefore must pay the costs of it.

When a Petition is presented for payment of the fund out of Court Mr. *Curson* will be allowed all such costs as he is properly entitled to.

Solicitor for the Plaintiff: Mr. *R. H. Peacock.*
Solicitor for the Defendant: Mr. *C. Blake.*

METROPOLITAN BOARD OF WORKS *v.* SANT.

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1868
Nov. 5.

Title to Land—Ejectment—Rolt's Act (25 & 26 *Vict. c.* 42).

Certain land in the possession of one of the Defendants having been injuriously affected by the Plaintiffs' works, the damage was assessed by a jury, but as the other Defendant set up a title to the property in question, the Plaintiffs filed a bill to have it declared which of the Defendants was entitled to the compensation awarded:—

Held, that the question of title to the money being only incidental to the title to the land, the case did not come within *Sir John Rolt's Act*, and that the Defendant in possession had a right to put the other Defendant to prove his title in an action of ejectment.

THE bill stated that the Defendants, *J. Sant & W. Cockburn* having claimed from the Plaintiffs, in respect of the construction by them of the *Thames Embankment*, compensation under the 68th section of the *Lands Clauses Act*, by reason of certain lands and buildings, of which the Defendants *Sant & Cockburn* claimed to be the absolute owners in fee simple in possession, being injuriously affected by the execution of the *Thames Embankment* works, and having required the amount of such compensation to be assessed by a jury, the amount thereof had been duly assessed at £9237; but such sum had not been paid by reason of the Defendant *George Drummond* having also claimed to be absolute owner in fee simple in possession of the same lands and buildings, and, as such, entitled to the compensation properly payable as aforesaid.

There being such conflicting claims, and such claims being only capable of being determined by this Court upon inquiry into the title to the said lands and buildings, the Plaintiffs were unable to pay either of the claimants the sum so assessed, which had accordingly been paid into the *Union Bank of London*, in the names of Sir *J. Thwaites*, the chairman of the board, and *J. Sant*, to abide the decision of a competent Court as to the title to the freehold of the hereditaments and premises.

The bill prayed that it might be ascertained, under the direction of this Court, whether the Defendants *Sant & Cockburn* were, or

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the Defendant *G. Drummond* was, entitled to the aforesaid compensation, and that for that purpose the necessary inquiries and directions as to the title of the said lands and buildings might be given.

The Defendants *Sant & Cockburn* had been in possession of certain lands and buildings contiguous to the premises in question since the year 1805, they having taken an assignment of a lease for ninety-nine years from *Drummond's* predecessor in title. The premises for which compensation was now claimed were alleged by *Drummond* to be an accretion to the adjoining premises, granted at the time of the embankment of a portion of the river *Thames* in 1770, and consequently to follow the title of the property in respect of which they were granted. The lease having recently expired, the premises originally comprised in it were given up, but the accretion thereto was claimed by *Sant & Cockburn*, on the ground that it was granted to the persons in possession of the lease for their own use and benefit.

Mr. *C. Hall*, for the Plaintiffs.

Mr. *Glasse*, Q.C., and Mr. *C. Barber*, for the Defendants *Sant & Cockburn*:—

These Defendants are now in possession of this piece of land, which is claimed by the Defendant *Drummond*, but being in possession they have a right to put the adverse claimant to prove his title in an action of ejectment. The real question in dispute is the title to the land, and the person entitled to the land will also be entitled to the compensation awarded by the jury. This is not a case in which these Defendants ought to be called upon by this Court to prove their title in Chambers, and it is not a case within *Rolt's Act* (25 & 26 Vict. c. 42).

Mr. *Chitty*, for the Defendant *Drummond*:—

This is precisely a case to which *Sir John Rolt's Act* applies. The question in the suit is who is entitled to this compensation money, and the title to the land is incidental to that question, consequently the Court of Chancery is bound to decide it without putting this Defendant to bring an action of ejectment. But if an action were brought, the deeds, documents, and other evidence necessary to shew the title to the estate are so voluminous and complicated, that it would be very inconvenient, even if it were possible, for a jury to come to any decision as to their legal operation; and if the right of Mr. *Drummond* were submitted to a jury the consequence would be that the Judge at the trial would insist upon the cause being referred. Under any circumstances, therefore, the Court of Chancery is the most convenient as well as the most proper tribunal for deciding a question of disputed title of this nature.

Sir R. Malins, V.C.:—

This is a question of principle. The Defendants *Sant & Cockburn* have been in possession of certain land on the banks of the *Thames*, and in the execution of the public works for the embankment of the river the Plaintiffs have found it necessary to affect that land injuriously. An assessment has been regularly made under the *Lands Clauses Act*, and the jury have awarded the damages for the land being so injuriously affected at the sum of £9237, which sum now awaits the decision of the question who is entitled to the land. Mr. *Drummond* says he is entitled to the land, and he states that Messrs. *Sant & Cockburn* were his tenants of some contiguous property, the lease of which has lately expired. It is said by *Drummond* that the premises which have been injuriously affected by the *Thames Embankment* works are an accretion to the property comprised in the lease and follow the same title, and, consequently, ought to have been delivered up at the expiration of the lease. The allegation, therefore, is, that the Defendants *Sant & Cockburn* have retained possession of land which they were bound to deliver up. Now the only relief in such a case is bringing an action of ejectment; the only remedy which Mr. *Drummond* has is to turn the other Defendants out of possession. This is the ordinary course where a tenant keeps possession after the expiration of a lease, and but for the accidental circumstance of the land being injuriously affected by the works of the *Thames Embankment*, it is clear that Mr. *Drummond* would have had no other means of trying the question. But then it is said that under *Sir John Rolt's Act* the question may be tried in this Court, on the ground that the real question is, who is the party entitled to the money, and the title to the land is only incidental to that question. In my opinion, however, it is clear that the real question at issue is the title to the land, because it is admitted that whoever is entitled to the land is likewise entitled to the money now awarded in respect of the land being injuriously affected. The title to the money, therefore, is only incidental to the title to the land, and I cannot permit the accidental circumstance of the intervention of the Board of Works to give Mr. *Drummond* a better remedy for proving his title than he previously had. By the machinery of an inquiry in Chambers, the Defendants *Sant & Cockburn* would be put to prove their title against the adverse claimant, while the fact of their being in possession gives them a right to put the adverse claimant to prove his title. It is not the course of this Court to deprive a person in possession of his right to have an action of ejectment brought against him, and I see no reason to depart from the ordinary course in this case. There is no doubt that in all cases properly within *Sir John Rolt's Act* this Court is compelled to decide questions of law or fact without sending them to another tribunal; but this is not a case to be dealt with under that statute, for by the 4th section it is distinctly provided that where the object of any suit is to recover the possession of land under a legal title, such relief only shall be given in Equity as would have been proper according to the rules and practice of the Court if this Act had not been passed. The question, therefore, must be decided at Law, and Mr. *Drummond* must try his title by an action of ejectment. The money must, in the meantime, be brought into Court and invested.

Solicitor for the Plaintiffs: Mr. *W. W. Smith.*

Solicitor for Messrs. *Sant & Cockburn*: Mr. *H. B. Clarke.*

Solicitors for Mr. *Drummond*: Messrs. *Fladgate, Clarke, & Finch.*

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Dec. 14, 15.

4 Ch. 427,
5 Ch. 775,
9 Ch 567
10 Ch 64
644-7
2 Ch.D. 28

Bankruptcy—Bills in possession of Bankrupt Firm—Remittances sent by corresponding Firm to cover Acceptances—Bankruptcy of both Firms.

By a written agreement, *B. L. & Co.*, of *Barbados*, were in the habit of buying sugar and consigning it to *W. R. & Co.*, of *London*, paying for it in drafts upon *W. R. & Co.*, indorsed over to the planters. By an unwritten agreement or custom, *B. L. & Co.* were also in the habit of drawing bills upon *W. R. & Co.*, and selling the drafts to bankers and others, and then of buying bills and remitting them to *London* to keep *W. R. & Co.* in funds to meet their acceptances of the drafts so drawn upon them, the amounts being carried into general account. *W. R. & Co.* stopped payment. At the time, undue acceptances of theirs were running to the extent of about £25,000. Upon the news arriving in *Barbados*, *B. L. & Co.* also stopped payment, and were made insolvent according to the law of the island. After the stoppage of the *London* firm, drafts arrived in *London* for acceptance to the amount of about £16,000, which were dishonoured; and remittances arrived to the amount of nearly £12,000. *W. R. & Co.*, were afterwards made bankrupt:—

Held, that there was no specific appropriation of the remittances to cover the drafts sent home by the same mails for acceptance:

Held, further, that the remittances must be carried into general account between the firms; and that so far as they were *in specie*, or to be treated as *in specie*, at the time of the bankruptcy the principle of *Ex parte Waring* (1) and *Powles* v. *Hargreaves* (2) must apply.

S C on another point W. N. (70) 265

FROM 1848 till 1865, the firm of *William Rattray & Co.*, of *London*, merchants and commission agents, consisted of *Andrew Barron* and another, or others; from 1865 to the 24th of September, 1866, it consisted of *Andrew Barron* alone.

In 1857, the firm of *Barron, Laurie, & Co.*, of *Barbados*, was established by the same *Andrew Barron* and *William Laurie*. In 1862, *Barron, Laurie, & Co.* were reconstituted by the admission of *Robert Arthur*, a third partner; and by an agreement dated the 1st of January, 1863, and made between *Andrew Barron*, therein described as of *London* and *Barbados*, *William Laurie*, of *Barbados*, and *Robert Arthur*, of *Barbados*, the three parties agreed to form a partnership "for the purpose of carrying on general mercantile and commission business in the island of *Barbados*," and more especially for carrying on business in connection with the firm of *William Rattray & Co.*, of *London*, upon

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(1) 19 Ves. 345. (2) 3 D. M. & G. 430. 17 Jun 1883

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the terms of an agreement of even date. In this partnership *Andrew Barron* was the principal partner.

The agreement of even date was made between the two firms of *William Rattray & Co.* and *Barron, Laurie, & Co.*, and provided as follows:—

"1. All goods purchased or ordered from *Europe* to be ordered from, and purchased through, the firm of *William Rattray & Co.*, of *London*, who are to charge 2½ per cent. for commission, and ½ per cent. for bank commission on same.

"2. No bank commission to be charged on bills drawn, or remittances made, except for goods as above, and also for such bills and remittances and payments as require to be made for *American* goods.

"3. On all consignments influenced by *William Rattray & Co.*, or advanced on by them, a return commission of 1 per cent. to be allowed.

"4. Goods shipped on consignment by *William Rattray & Co.* to be subject to a selling commission of 2½ per cent., and shall be entirely at their own risk.

"5. Ships chartered in *Barbados* for the purpose of loading produce consigned to *William Rattray & Co.*, to be for their account, and a commission of 1 per cent. on amount of freight to be allowed by them for the chartering of same, unless a commission is obtained by the *Barbados* firm from the ships, and in such case no commission is to be paid by *William Rattray & Co.*

"6. On the freight of all tonnage engaged for produce to *London*, not being consigned to *William Rattray & Co.*, a commission of 2½ per cent. to be allowed the *Barbados* firm (N.B. The *James Holmes* is of the class of tonnage meant). A commission of 4*s.* 6*d.* per hogshead to be allowed the *Barbados* firm on all sugars consigned in the regular way to *William Rattray & Co.* (two tierces, or eight barrels, being considered equal to one hogshead), on molasses one shilling per puncheon, and any other goods in proportion.

"7. *Barbados* firm to perform the business of chartered ships on the terms specified in their charters, and the business of *William Rattray & Co.'s* own ships at sixteen dollars each, with no charge on disbursements.

"8. Purchases of sugar home, according to fulfilment of charter-parties, to be for account and risk of *William Rattray & Co.* only, and subject to a commission of 2½ per cent. to the *Barbados* firm, unless where such purchases end in a loss, in which case the commission to be returned.

"9. When the *Barbados* firm succeed in obtaining an address commission on any ships chartered in *Barbados* for *William Rattray & Co.'s* sugars, the half of the said commission shall be credited to the *Barbados* firm.

"10. The *Barbados* firm shall be responsible for and pay one-fifth of the losses and bad debts which may be caused by advances to planters."

Under this agreement, large transactions were carried on, the course of business being as follows:—

The *Barbados* firm were in the habit of collecting parcels of sugar and other produce of the island, and consigning them to the *London* firm for sale, receiving for so doing a fixed commission (Art. 6). The *Barbados* firm used to indorse all bills drawn on *William Rattray & Co.* by planters requiring advances, which bills the planters could, by reason of such indorsements, readily negotiate in the island.

Concurrently with the above, there was an unwritten agreement or custom between the firms, which was thus carried out: *Barron, Laurie & Co.* were in the habit of drawing on *William Rattray & Co.* drafts for various amounts, which they sold to bankers and others in *Barbados* for ready money; and these drafts, when sent to *London* by the buyers, were accepted, and in due course paid, by *William Rattray & Co.* Then, in order to place the *London* firm in funds to meet these acceptances when they became due, the *Barbados* firm used to send to the *London* house remittances, consisting chiefly of drafts drawn on merchants or bankers in *England*, which *Barron, Laurie & Co.* had purchased in *Barbados.* These drafts were not accepted by the persons on whom they were drawn till after their receipt by *William Rattray & Co.* The *London* house used to present them for acceptance, and then discount them for ready money.

On the 18th of June, 1866, *William Rattray & Co.* suspended payment, and an attempt was made to wind up the affairs of the

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firm under inspection, *William Joseph White* being appointed manager.

At this date there were current acceptances of *William Rattray & Co.* to drafts of *Barron, Laurie, & Co.* to the extent of £25,654 7*s.* 6*d.* These were not paid at maturity.

As soon as the news of the suspension reached *Barbados, Barron, Laurie, & Co.* also stopped payment, and were afterwards made insolvent according to the law of the island. The adjudication was dated the 20th of July, 1866.

After the stoppage of the *London* house, there arrived several consignments of produce, which had been despatched by the *Barbados* house before the news of the stoppage reached the island. These were not the subject of this suit.

There also arrived, after the stoppage, a large number of bills, which had been purchased by *Barron, Laurie, & Co.* in *Barbados,* and remitted by them before the news arrived by three mails which left on the 11th of June, the 26th of June, and the 11th of July. These remittances on being received by *Andrew Barron,* were handed by him to *White,* the manager, who realized them all with a few exceptions. The proceeds of these remittances, amounting to £11,791 8*s.* 8*d.*, were the subject of the present contest.

By the same mails which brought the remittances, there arrived also from the holders drafts to the amount of about £16,000, which *Barron, Laurie, & Co.* had drawn upon *William Rattray,* and had sold in the island. These drafts could not be accepted by the *London* firm, which had stopped payment; and they never had been accepted.

The attempt to wind up under inspection failed, and the firm of *William Rattray & Co.* were, on the 24th of September, 1866, adjudicated bankrupt.

On the 20th of March, 1867, this bill was filed by *William Paget Trimingham,* the official assignee in insolvency at *Barbados* of *Barron, Laurie, & Co.*, against *William Maud, Robert Slater,* and *Thomas Scrutton* the younger, the assignees in bankruptcy of *William Rattray & Co., William Joseph White,* the manager, the *Colonial Bank* (who were dismissed before the hearing), and the *Merchants' Banking Company of London, Limited,* praying for a declaration that the Plaintiff was entitled to the proceeds of the remittances realized by *White*, and for payment accordingly; and that the Defendants, the manager, and the assignees in bankruptcy of *William Rattray & Co.*, might be restrained from parting with the same.

Relief was also prayed against the *Merchants' Banking Company*, who had discounted acceptances of *William Rattray & Co.*, but, after some discussion, the claim of the bank was reserved to be disposed of in another pending suit.

The Plaintiff, by his bill, claimed the remittances in question on the ground, amongst others, that they were specifically appropriated to meet the £16,000 drafts that were sent for acceptance by the same mails; but this contention was abandoned at the hearing; and the Plaintiff then made the following case founded on an affidavit of Mr. *William Laurie.*

He said that in the business of collecting and consigning sugar to *London* the *Barbados* firm were the principals, and the *London* house their agents. This business was conducted on two accounts, the produce account, and the bill account. The remittances which had been purchased by the *Barbados* house on the bill account, arriving as they did after the suspension, remained the property of *Barron, Laurie, & Co.*

He further maintained that the *London* firm were entitled to credit themselves with their own acceptances only when they were paid, not when they were accepted; consequently that *William Rattray & Co* could not credit themselves in the bill account between the two houses with the sum of £25,654 7*s.* 6*d.* which they had never paid. The result was, that there was a balance on the bill account in favour of *Barron, Laurie, & Co.*, of £19,820 4*s.* 6½*d.* This being so, *William Rattray & Co.* had no occasion to use the remittances, and the proceeds, consequently, belonged to the Plaintiff.

The Defendants, the assignees in bankruptcy of *William Rattray & Co.*, on the other hand, denied that the *London* firm acted as agents of the *Barbados* firm in the collection and consignment of sugar (except in a few transaction of trivial amount). In the collection and consignment of sugar the *London* house were the principals, and the *Barbados* house were their factors and agents, for which agency they received a fixed commission. The privilege of drawing upon the *London* house was given to the *Barbados* house in order to secure to them the advantage of a floating capital for the purpose of developing the businesses of both houses. The remittances were sent to *England* and received by *William Rattray & Co.*, as *Barron* deposed, "on the understanding that *William Rattray & Co.* were to deal with the same in such manner as they thought best, either by discounting or otherwise, credit being given for the amount thereof in the general account current between the two firms." There never were two accounts between the firms. There was, and always had been, one general account embracing every transaction; but until the accounts were taken it was impossible to say on which side the balance would be.

As to the mode of keeping the accounts, the evidence shewed as follows:—

When goods were consigned the manifest accompanying each bill of lading specified the planter to whom each particular parcel of sugar belonged. Accounts with the planters were kept by both firms in duplicate. The proceeds of each parcel were placed to the credit of the planters, who were debited with the advances made to them.

As to the accounts between the two firms, *Joseph Palmer* the former book-keeper of *William Rattray & Co.*, in an affidavit filed on behalf of the Plaintiff, exhibited a copy of the ledger of *William Rattray & Co.*, which shewed that the acceptances of the firm were there entered as of the date when they were given, and remittances of bills as of the date when they were received. Supporting, however, Mr. *Laurie's* view, the book-keeper gave the following explanation of the matter:—"The account between *Barron, Laurie, & Co.*, and *William Rattray & Co.*, was an interest account, and therefore, for the purposes of interest, *Barron, Laurie, & Co.* were not debited with the acceptances of *William Rattray & Co.* until they were paid, though they were entered against them in the account as of the date when the acceptance was given; and similarly remittances of bills were, though placed for record to their credit in the account, not finally so placed, and so as to carry interest, until they were encashed by *William Rattray & Co.*, although such bills were, as a rule, discounted on their being accepted."

On the other hand, Mr. *Barron*, on behalf of the Defendants, the assignees, deposed that in keeping the account it was the invariable practice to enter the remittances as of the date of their receipt, and the acceptances as of the date of their acceptance, though not payable till three months afterwards, "subject only to an equitable apportionment in respect of interest." On the 31st of December in every year the account was closed and a balance struck. On the 31st of December, 1865, a copy of an account for the past year, made out as above, and shewing a balance of £2647 5*s.* 8*d.* to the credit of *Barron, Laurie, & Co.*, was forwarded to the *Barbados* house, and was duly acknowledged by them by letter of the 16th of February, 1866.

In further illustration of the practice of the two firms, three letters from *Barron, Laurie, & Co.* to *William Rattray & Co.* were exhibited, which were sent by the three mails above mentioned. Each of these letters was in two parts: the first of which related to the consignments. The second part began thus: "We beg to advise the following drafts, which please place to our account;" and then followed a list of the drafts to the amount of about £16,000 above mentioned. The letters then proceeded:— "We enclose the following firsts of exchange, which place to our credit;" followed by a list of the remittances now in question: and the letters concluded with: "The following have been drawn on planters' account;" and then another list of drafts.

It further appeared that the £25,654 7*s.* 6*d.* protested drafts on *William Rattray & Co.*, had been, or would be, proved against the estate of *Barron, Laurie, & Co.* in *Barbados*; and a dividend had been declared payable, and had been paid thereon, of 2*s.* in the pound.

Under an order in this suit the proceeds of the remittances, amounting with interest to £11,966 1*s.*, had been paid into Court by *White*, the manager.

Mr. *Druce*, Q.C., and Mr. *Robinson*, for the Plaintiff:—

The bill was in error in alleging that there was a specific appropriation of these remittances to cover the particular drafts that were sent for acceptance by the same mails; that allegation we withdraw.

The first question is, do these remittances belong to us, or must

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they go into account as between the two firms? The second is—Are the unpaid acceptances to be kept out of the bill account between the two firms?

As to the first point, we say that our property in these remittances was never altered. They were forwarded by us to *William Rattray & Co.* as our *London* agents, under a condition implied in the course of dealing, that they were to be used against acceptances of our drafts, not any specific drafts, but generally. Unless and until they were so used they remained our property. Arriving as they did when acceptance was no longer possible, the condition was unfulfilled. Hence they belong to us: *Ex parte Pease* (1).

If this be the correct view, the principle of *Ex parte Waring* (2), and *Powles* v. *Hargreaves* (3), followed by *Ex parte Carrick* (4), has no application.

When the *London* house stopped, they were, as we say, indebted to us on the bill account; inasmuch as the case of *Ex parte Metcalfe* (5) shews that we are entitled to prove against them for the balance due to us, not taking into account the dishonoured drafts. There was no occasion, therefore, for the *London* house to use these remittances.

The VICE-CHANCELLOR:—If these remittances are brought into account at all, as far as they were *in specie*, *Ex parte Waring* must apply.

Mr. *Amphlett*, Q.C., and Mr. *Pontifex*, for the assignees in bankruptcy of the *London* firm:—

There was but one general account in all the transactions between the houses.

The terms of the agreement conclusively shew that in all remittances, whether of sugar or bills, to *England*, the *London* house were the principals, and the *Barbados* house only the factors. The 10th article was purposely inserted to make the *Barbados* firm careful.

Hence the remitted bills were the property of the *London* house

(1) 19 Ves. 25; 1 Rose, 232.

(2) 19 Ves, 345.

(3) 3 D. M. & G. 430, 17 Jur 1083,

(4) 2 De G. & J. 208.

(5) 11 Ves. 404.

from the moment of their purchase. *Ex parte Waring* (1) has no application. It is immaterial in this respect whether the remittances came as bills or in cash. No question can arise as to the right of the *Barbados* firm to have returned to them property which was never theirs.

Then it is said, supposing the remittances to be our property, there was imposed on us a correlative duty of accepting the drafts. But where is the agreement or letter to shew that failure in this alleged duty was to forfeit our right to the property? The remedy against us, if any, would be by action.

But we deny the alleged duty. This was a case of ordinary remittances, and the evidence shews that they were to be dealt with "as we should think best," by discounting or otherwise, giving our agents credit for the amount in the general business account of the two firms.

In *Ex parte Pease* (2) the contract was very special. The remittances were uniformly stated as the property of the remitting parties, to be held by the bankers on account of the remitting parties as they became due, at which time the proceeds were first brought into the account. Here the evidence shews that the remittances were always entered as of the day of their receipt.

It makes no difference that the remitted bills did not arrive till after the bankruptcy: *Ex parte Pease; Bolton* v. *Puller* (3).

Vertue v. *Jewell* (4) shews that where goods are consigned on account of a general balance, the consignor has no right to stop them *in transitu*.

These bills were in the order and disposition of the bankrupts.

The VICE-CHANCELLOR observed that that point had not been taken in the answer.

Mr. *W. Rudall*, for the Defendant *White*.

Mr. *Kay*, Q.C., and Mr. *Eddis*, for the Defendants, the *Merchants' Banking Company*, adopted Mr. *Amphlett's* argument, and cited *Collins* v. *Martin* (5).

(1) 19 Ves. 345.
(2) Ibid. 25, 43.
(3) 1 B. & P. 539.
(4) 4 Camp. 31.
(5) 1 B. & P. 648, 652.

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Mr. *Druce*, in reply:—

As to the agency, either house was the agent of the other, according to the nature of the transaction. In these sugar consignments and remittances, the *Barbados* house were the principals, and the *London* house ought to have obeyed the instructions and fulfilled the intentions of their principals.

The VICE-CHANCELLOR:—But were not the *London* house the principals?

Mr. *Druce*:—If the Court be against us on this point, we then say, when the suspension of payments took place these remittances had no use or purpose except to go into account, and shew what was really due as between us and the *London* firm. Is it possible for the assignees to take these funds, and say: "We refuse to accept the £16,000 worth of bills; and because we so refuse, these remittances are to be excluded from the account?"

If it be ruled that these remittances must go into the general account, we then claim the benefit of the principle of *Ex parte Waring* (1) for the bill-holders in partial relief of both estates.

SIR G. M. GIFFARD, V.C.:—

I think I may dispose of this case now, as far as I can, because it very much depends on questions of principle, and there does not seem to me to be any real conflict of fact.

With regard to the specific appropriation, if this had been the first transaction between the *Barbados* firm and the *London* firm the state of things would have been different from that with which I have to deal. It was not at all the first transaction. Their relations—it is not necessary to define them—were not the relations of factor and agent. There had been numerous dealings between them, and there was kept by the *London* house a general account with the house at *Barbados*; and, beyond all question, the *Barbados* house remitted, generally, on account.

I do not think that the matter can be put more clearly than it is in the 9th paragraph of Mr. *Barron's* affidavit. He says: "In addition to the provisions of the said agreement hereinbefore referred to"—that is, the agreement proved by the Plaintiff—"it was, further, the custom between the said two firms that *Barron, Laurie, & Co.* should have the privilege (being, in fact, a drawing credit) of drawing bills of exchange upon *William Rattray & Co.* (which, from the long-established character of the latter firm, were easily negotiable in *Barbados*), so as to give *Barron, Laurie, & Co.* the advantages of a floating capital for the purpose of carrying on and developing the businesses of both firms; and I say that *Barron, Laurie, & Co.* were accordingly in the habit of drawing bills of exchange for various amounts on *William Rattray & Co.*, and selling such bills in *Barbados.* They also bought bills in *Barbados,* and remitted them to *William Rattray & Co.*, in order to place the latter firm in funds to repay them for bills so accepted by them, and already matured and paid, as also to meet and provide for other such bills when matured, and also to repay *William Rattray & Co.* for any purchases made in *England* on their behalf in accordance with the said agreement. Such bills were remitted to *William Rattray & Co.*, and received by them on the understanding that *William Rattray & Co.* were to deal with the same in such manner as they thought best, either by discounting or otherwise, credit being given for the amount thereof in the general account current between the two firms. None of the said bills so remitted to *William Rattray* were specifically appropriated to meet the bills drawn by *Barron, Laurie, & Co.* on *William Rattray & Co.*, but were sent on the understanding hereinbefore mentioned, and were not specifically appropriated to any particular payments. And I further say that the custom between the two firms with regard to such remittances was to treat *William Rattray & Co.* as the absolute, unfettered, and uncontrolled owners of such remittances immediately on the receipt thereof by them; and that such has been the invariable practice and course of proceeding between the *Barbados* and *London* firms, not only since the year 1863, when the said agreement was executed, but prior thereto."

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(1) 19 Ves. 345.

That being the course of dealing between the parties, we cannot arrive at a specific appropriation, unless we find it in the terms of the letters that accompanied the remittances. If we look to the terms of the letters, they amount to this and nothing else,—that there was a certain number of drafts which the *London* house were required to accept, and there was a certain amount of

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remittances sent—sometimes nearly the same amount, sometimes not quite the same amount—but not a syllable about specific appropriation.

In the absence of anything in these letters, according to the true course of dealing, beyond all question, the remittances were sent on general account; and being sent on general account, the party receiving them had a right to retain them, could hand them over to other parties, and so make a title to those other parties. But if they remained *in specie* at the date of the bankruptcy, then a different state of circumstances arose, with which I will deal presently.

Again, the fact that the drafts which accompanied these letters were refused acceptance would not prevent the *London* firm who received the remittances from having the property in these remittances, or dealing with them. At the utmost, the arrangement between the parties amounted to this, that the firm receiving them might possibly be liable in damages for not accepting the drafts; but could not be deprived of the right to deal with the remittances which were so sent. These observations, I think, dispose of that part of the case.

Then, also, if we come to the general dealing and understanding between the parties, on the Defendant's evidence it was this—that in some shape or other, either the bills which were sent, or the proceeds of those bills, were to be carried into general account between the two firms.

If these remittances are found *in specie*, or what is equivalent to being *in specie*, at the date of the bankruptcy, I think that *Ex parte Pease* (1) quite warrants me in saying what in my opinion justice also warrants me in saying, namely, that it is the right of the party who is the remitter to say to the persons who have in their hands these remittances *in specie*, that they shall be applied on general account. I do not go beyond that. It is the right of the party remitting on such an understanding as this to say that these remittances shall be applied on general account, and shall not be abstracted from that general account, and go for the benefit of a number of creditors who were never intended to have any interest whatever in those remittances.

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(1) 19 Ves. 25, 43.

That being so, I am enabled to arrive at a very clear conclusion as to the relations between these parties, and I may make a very plain declaration on that subject.

But, before doing so, I should observe, I am clearly of opinion that as these remittances were posted before the bankruptcy, and posted, I am satisfied, with the intention of being remittances on general account, the property passed—I admit, *sub modo,* and subject to the right of the parties to say that so long as it remained *in specie* it should be appropriated to general account—to the Defendants, the *London* firm.

That being so, I think it will be proper, first, to declare "that the remittances were not specifically appropriated as between *Barron, Laurie & Co.* and *Rattray & Co.*" I think the dealings with the remittances between *Barron* and *White* amount to nothing. All that was done with the remittances was this—they came to the hands of *Barron,* and *Barron,* as I understand, handed them over to *White,* the inspector; this being done on the supposition that the inspectorship would be carried out. The inspectorship fell through, and the state of things was the same as if the remittances had been in the hands of *Barron* at the time. I think it does not make the slightest difference that *White* realized these remittances, because he had the proceeds distinguished in his hands at the time. Therefore I treat them as if they were *in specie.*

Then the second declaration will be, that "so far as the remittances at the date of the bankruptcy were *in specie,* or the proceeds in the hands of *White,* it was the right of the Plaintiff to have the same appropriated to the purposes of the general account, subject, however, to the right of the *Merchants' Bank,* if any, and to the right of the *London* firm, to appropriate to any part of the account."

Then, when we bring the matter to that point, *Ex parte Waring* (1) necessarily applies; that is to say, unless it is desired by the *London* firm to make any appropriation of any part of these remittances otherwise than to the acceptances. I understand they do not desire anything of the sort.

[Mr. *Amphlett* requested that the order might not be drawn up as committing his clients to "desiring" or "submitting" anything.]

(1) 19 Ves. 345.

Then the declaration will be in the following form:—

"Declare that so far as the remittances are applicable to the acceptances, the doctrine in *Ex parte Waring* (1) will apply; and inquire whether any and what part of the remittances are properly applicable to the acceptances, unless the parties can agree on this. These declarations and inquiry to be subject to the rights of the *Merchants' Bank*."

The next question is this—whether the Plaintiff is to be charged with the full amount of the acceptances. I cannot see any ground for charging him with the full amount of the acceptances, whether paid or not; that is, in the account between the two bankruptcies. Supposing it to be the fact that there has been a proof and payment of dividends on both sides, I suppose the *Barbados* firm will have a right to retain any dividend by way of indemnity against any claims that may be made on them in respect of the acceptances which are not paid.

Mr. *Druce* asked for a declaration that, in taking the account as between the two houses, the *Barbados* house was not to be charged in account with more than the dividends that the *London* house actually paid.

The VICE-CHANCELLOR:—I cannot direct a retainer in bankruptcy, nor a proof. There cannot be a doubt as to what the result will be.

The concluding declarations were as follows:—

Costs of all parties out of the fund as between solicitor and client, except the *Colonial Bank* and the *Merchants' Bank*, who are to have their costs as between party and party, and excepting their costs of the cross-examination and admissions, which are to be dealt with in the other suit.

Rest of suit to stand over to come on with the *Merchants' Bank* suit.

£3000, part of the fund, to be carried to credit of that suit.

Plaintiffs in that suit to give notice of motion for decree; and evidence in this suit to be evidence in that, saving just exceptions as between all parties.

Solicitors for the Plaintiff: Messrs. *Druce, Sons, & Jackson.*

Solicitors for the Defendants: Mr. *C. Champion*; Mr. *James Robinson*; Messrs. *Flux, Argles, & Rawlins.*

(1) 19 Ves. 345.

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Nov. 24.

3 Ch D. 172

Election—Married Woman—Power of Appointment—Failure by subsequent Event.

A., a married woman, having a general power of appointment notwithstanding coverture over fund (*a*), and also by her marriage settlement power to appoint funds (*b*) and (*c*) in case she died in her husband's lifetime, by her will, made in her husband's lifetime, appointed all these funds amongst several persons, some of whom were her next of kin. By the death of her husband in her lifetime *A.* became absolutely entitled to (*b*) and (*c*), but her will was not republished. Probate being limited to fund (*a*), which was insufficient to pay the legacies in full:—

Held, that those of the legatees who were also next of kin were not put to their election, but were entitled both to their shares of the residue (as to which, in the events that had happened, the appointment had failed), and also to proportionate parts of their legacies.

SPECIAL CASE.

By the will of her mother, *Jane Grindle*, dated the 2nd of March, 1818, Dame *Elizabeth Nickle*, then *Elizabeth Grindle*, spinster, became entitled to a fund, now represented by £8100 consols, for life for her separate use, with remainder in trust for her children. But in case she should have no child, then in trust for such persons as she should by deed or will (notwithstanding any future coverture) direct or appoint.

Elizabeth Grindle was married more than once, but never had issue. By the settlement made upon her marriage in 1846 with her last husband, Sir *Robert Nickle*, personal estate was settled upon trust during the joint lives of husband and wife to pay the interest to Dame *Elizabeth Nickle* for her separate use without power of anticipation; in case Sir *R. Nickle* should die in the lifetime of Dame *Elizabeth*, then in trust, as to principal and interest, for Dame *Elizabeth*, her executors, administrators, and assigns, absolutely; in case Dame *Elizabeth* should die in her husband's lifetime, in trust for such persons in such shares as she, notwithstanding coverture, and as if she were sole and unmarried, should at any time or times during her life by will appoint; in default of such appointment, and so far as any such, if incomplete, should not extend, then, after the death of Dame *Elizabeth* in the lifetime of Sir *Robert*, in

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trust to pay the interest to him, and after his death, as to all the trust funds whereof no such direction, appointment, gift, or bequest should have been made, in trust for those who would have been entitled at her death as the next of kin in case she had died intestate and unmarried.

Sir *Robert Nickle* died in May, 1856. Dame *Elizabeth Nickle* died in March, 1867, having by a will, dated the 17th of February, 1853 (during her husband's lifetime), in exercise of the powers of appointment reserved to her by her marriage settlement (in case she predeceased her husband), and by her mother's will generally, appointed all and singular the trust moneys, stocks, and securities, and all other real and personal estate whatsoever and wheresoever over which she had a power of appointment and disposal, amongst several persons in proportions not material for the purposes of this report.

Her will was not republished after the death of Sir *R. Nickle*. The grant of probate by the Ecclesiastical Court was limited "to the administration of all such personal estate and effects as the deceased, by virtue of the will of *Jane Grindle*, and of all other powers and authorities her enabling, had a right to appoint or dispose of, and has, in and by her said will, appointed or disposed accordingly, but no further or otherwise"—that is, to the £8100 derived from her mother's will. The £8100 was insufficient to pay the legacies in full, but the residue in the hands of the administrator, being the funds comprised in the settlement made upon her marriage with Sir *R. Grindle*, was sufficient for that purpose.

The will being admittedly inoperative so far as it purported to be an exercise of the power given to Dame *Elizabeth* in the event of her dying in her husband's lifetime, and being also inoperative (from being made during coverture without having been republished after her husband's death) to deal with her absolute interest, the following questions were raised by special case: 1. Whether those of the Defendants who were the next of kin of Dame *Elizabeth Nickle*, and also legatees under her will, were entitled both to their shares of the undisposed-of residue of her estate as such next of kin, and also to the payment out of the £8100 of proportionate parts of their several legacies bequeathed to them by her will, or whether such Defendants were bound to elect between these legacies and their respective shares of the undisposed-of residue? 2. How the debts, funeral and testamentary expenses, and costs, were to be borne?

Mr. *Nalder* (Mr. *Amphlett*, Q.C., with him), for the Plaintiff, the surviving executor of Lady *Nickle.*

Mr. *Druce*, Q.C., and Mr. *Montagu Cookson*, for the next of kin who were also legatees, contended that no case of election arose where there was a personal incompetency to bequeath, there being here no power, in the events that had happened, to appoint anything but the £8100: *Rich* v. *Cockell* (1). In order to put the parties to their election there must be a clear and expressed intention on the face of the will: *Sheddon* v. *Goodrich* (2).

Mr. *Macnaghten*, for a legatee who was not one of the next of kin:—

The next of kin who are legatees are clearly put to their election. They cannot approbate and reprobate by claiming the benefits given to them by will, and at the same time taking advantage as next of kin of the incompetency of the testatrix to deal with the bulk of the property, and setting up a legal right to disappoint the claims of other persons under the same instrument. The rule on which the Court acts in cases of election is the intention to dispose of that over which the testator has no power of disposition: *Ker* v. *Wauchope* (3); *Thellusson* v. *Woodford* (4); there being only two cases in which this rule has been broken in upon:—1. Where there was an attempt to devise by a will not duly executed; and 2. Where there was a personal incompetency to dispose of real estate: *Hearle* v. *Greenbank* (5). In these cases the Court cannot look at the instrument unless the case is one of express condition annexed to the gift of personal estate, so that the lands do not pass by force of the will, but from the operation of the clause containing the condition: *Boughton* v. *Boughton* (6). Where, however, a testator, being entitled to heritable property in *Scotland*, not capable of being devised, affected by instrument in English form to devise

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(1) 9 Ves. 369, 381.
(2) 8 Ibid. 481.
(3) 1 Bli. 21.
(4) 13 Ves. 209.
(5) 1 Ves. Sen. 299; 3 Atk. 695.
(6) 2 Ves. Sen. 12.

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such property away from the Scotch heir to whom property in *England* was given, the instrument was held admissible as evidence of the maker's intention, and sufficient to put the heir to his election: *Brodie* v. *Barry* (1). So, in the converse case, the Scotch Courts will read against the English heir an instrument dealing with the whole of a testator's property (in *England* as well as *Scotland*) executed in the Scottish form, but imperfectly executed according to the *Statute of Frauds*, so as to put the heir to his election: *Dundas* v. *Dundas* (2); *Ker* v. *Wauchope* (3). In *Rich* v. *Cockell* (4) there was no adjudication by the Court of Probate that the will of the married woman was that species of instrument which the Court could read as such, there being simply a grant of administration *pendente lite*. Here, probate having been granted, the Court must read the will to gather the intention of the testatrix.

[He also cited *Tatnall* v. *Hankey* (5).]

[The VICE-CHANCELLOR:—Is there any instance of election under an instrument which was valid at the time of execution, but was rendered inoperative by subsequent events?]

The testatrix might have republished her will after her husband's death, but omitted to do so.

Mr. *Fischer*, for parties in the same interest, referred to *Welby* v. *Welby* (6), (following *Anon.* (7)) and *Streatfield* v. *Streatfield* (8).

Mr. *E. P. C. Hanson* (Mr. *Kay*, Q.C., with him), in the same interest.

SIR G. M. GIFFARD, V.C.:—

I am of opinion that there is no question of election here. The will, when it was executed, was a valid one, and effectual for disposing of this property, though it afterwards became inoperative.

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(1) 2 V. & B. 127.
(2) 2 Dow. & Cl. 349.
(3) 1 Bli. 21.
(4) 9 Ves. 369.
(5) 2 Moo. P. C. 342.
(6) 2 V. & B. 187.
(7) Gilb. 15.
(8) 1 Wh. & T. L. C. 303, 3rd Ed.

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It is unnecessary now to decide whether a married woman can or cannot make a will which will raise a question of election, for this testatrix has certainly not done so. Those legatees who are also next of kin are entitled to have their legacies paid out of the appointed fund, abating rateably with the others, and also to share in the undisposed-of residue.

In answer to the second question, the debts, funeral, and testamentary expenses of the testatrix, and also the costs of all parties, must come out of the undisposed-of residue.

Solicitors: Messrs. *Cookson, Wainewright, & Co.;* Messrs. *Hedges & Stedman;* Messrs. *Tompson, Pickering, & Styan.*

V.-C. J.
1869
Jan. 27.

8 Ch. 258
1 Ch. D. 208

GARTH *v.* TOWNSEND.

Power—Defective Execution or Non-Execution—Intention to execute.

A. having in the events that happened power to appoint funds amongst her children by deed, or by her last will in writing, or any writing purporting to be or being in the nature of her last will, or any codicil thereto, to be signed and published in the presence of, and to be attested by, two credible witnesses, died intestate; but left in an envelope, addressed to her son, an unattested memorandum (signed by herself, and dated eight years before her death), "for my son and daughters. Not having made a will, I leave this memorandum, and hope my children will be guided by it, though it is not a legal document. The (funds) I wish divided as follows:"—(amongst her children, followed by bequests out of another fund, and a gift of the residue, and concluding,) "this paper contains my last wishes and blessings upon my dear children, and thanks for their love to me:"—

Held, that this memorandum shewed no intention to execute the power, and, consequently, that the Court could not remedy any defects in execution so as to give validity to it as an appointment.

DEMURRER.

By the settlement made in April, 1820, upon the marriage of *Thomas Garth* and *Charlotte Maitland*, two sums of £5000 and £3000 were limited, as the husband and wife should jointly by deed appoint, in favour of "all and every, or such one or more exclusively, of the other or others of the children and other issue" of the marriage (such issue respectively to be born before any such appointment should be made to them), and in default of such joint appointment then as the survivor should at any time or times after the decease of the other of them, and as to *Charlotte Maitland*, notwithstanding her coverture by any future husband, "by any deed or deeds, with or without power of revocation and new appointment (such new appointment to be in favour of some one or more of the objects of this present provision), to be sealed and delivered by such survivor in the presence of, and to be attested by, two or more credible witnesses, or by his or her last will and testament in writing, or any writing purporting to be or being in the nature of his or her last will and testament, or any codicil or codicils thereto to be respectively signed and published by such survivor in the presence of, and to be attested by, the like number of credible witnesses, shall direct or appoint."

In default of appointment the trustees were to pay, transfer, and assign the trust moneys unto and for the benefit of all and every the child and children of the marriage who being sons should attain twenty-one, or being daughters should attain twenty-one or be married with consent of parents or guardians. There were five children of the marriage, all of whom attained twenty-one. *Thomas Garth* died in November 1841, and *Charlotte*, his wife, died in 1868. The power of joint appointment was never exercised.

After the death of Mrs. *Garth*, on the 2nd of August, 1868, an envelope, addressed to her son, *Thomas Colleton Garth*, was found among her papers, containing the following memorandum:—

"20 July, 1860.

"Memorandum for my son and daughters. Not having made a will, I leave this memorandum and hope—and hope my children will be guided by it, though it is not a legal document. The £8000, my marriage portion, held by my trustees to the marriage settlement made in April, 1820, I wish divided as follows:—£1000 each to each of my married daughters, *Charlotte Harriet* and *Selina Mary*, independent of the control of their husbands, and the remaining £5000 to be equally divided between *Thomas Colleton, Penelope*, and *Louisa*. The stock which I hold in the 3 per Cent. Consols, I leave £1000 to my nephew *Frederick*, eldest son of my brother, and my godson; £100 to Mrs. *Clay*, daughter of my own old governess; £10 to Mrs. *Anna Knight*, at the lodge; £10 to *Adam Pullin*; the whole of the residue to go to my son *Thomas Colleton Garth*, being the legacy left me by my dear husband; the £1500 which my cousin *Frederick Charles* holds, I bequeath to him. The stock in the Reduced 3 per Cent. Annuities, is Mrs. *Challenor's*, about £120 stock.

"This paper contains my last wishes and blessings upon my dear children, and thanks for their love to me.

"*Charlotte Garth.*"

"20 July, 1860. *Haines Hill.*"

Mrs. *Garth* died intestate, without having exercised the power of appointment, except so far as the same was exercised or attempted to be exercised by the memorandum of July, 1860. The

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bill was filed for the purpose of obtaining a declaration that the memorandum of July, 1860, notwithstanding that it was not sealed and delivered by Mrs. *Garth* in the presence of, and attested by, two credible witnesses, was a valid execution in equity of the power of appointment given to Mrs. *Garth* by her marriage settlement.

To this bill the Defendants demurred.

Mr. *Willcock*, Q.C., and Mr. *W. Latham*, in support of the demurrer:—

The Court will aid a defective execution of a deed intended as an appointment, but will not take an imperfect or inchoate will and convert it into a deed, Courts of Equity not being able to set aside or relieve against the ceremonies required by the *Wills Act* (1 Vict. c. 26), s. 10. There must be a clear intention to execute the power, but here the expressions used by Mrs. *Garth* that it is "not a legal document," shew that she had no intention to execute the power, and was simply indicating her wishes to her children: *Carver* v. *Richards* (1); *Proby* v. *Landor* (2).

Mr. *Kay*, Q.C., and Mr. *Osborne Morgan*, in support of the bill:—

Mrs. *Garth* did not intend this memorandum to be a will. It is an informal document, and such as the law does not recognise as a will, but it is within the terms of the power, either as a writing in the nature of a will, or as a deed informally executed, and the persons to be benefited by it being the children who are the objects of the power, the Court will aid any defects in the execution of the instrument, such as the want of seal, in favour of the privileged class, and will not insist on treating it as a will in order to defeat its operation. The power is not confined to an appointment by will, and "If a man have a power to appoint by will, and do not strictly follow the form prescribed by the statute, the Act will avoid the will, although in favour of his children; but if he have a power to appoint by deed, and by a will, without even a witness, appoint to his children, Equity will aid the defect and make good the appointment:" *Sugden* on Powers (3).

(1) 27 Beav. 488; 5 Jur. N.S. 1412 (2) 28 Beav. 504. 6 Jur. N.S. 1278
(3) 8th Ed. p. 560.

[The VICE-CHANCELLOR :—Is any authority cited for that proposition ?]

No. In *Proby* v. *Landor* (1) a memorandum headed as this is headed, was held to be a valid execution of a power to appoint by "any deed or writing, or by his last will."

Where the intention to pass the property, the persons to be benefited, and the amount of benefit, are sufficiently indicated, there is enough for the Court to act upon, and it will rectify any mere informality in the mode of carrying out that intention : *Buckell* v. *Blenkhorn* (2) ; *West* v. *Ray* (3).

SIR W. M. JAMES, V.C. :—

The demurrer must be allowed. The true test is that mentioned by Mr. *Osborne Morgan* : is there a distinct intention to execute the power? Now here the persons to take and the amount to be taken, are sufficiently pointed out, but where the instrument fails is in intention to execute the power. Mrs. *Garth* purposely abstained from executing it. She simply wished her children to be quite unfettered, saying, "I tell you my wishes, but I do not mean to tie you up by any legal document. I know I have power to appoint these funds, but I do not exercise that power." The jurisdiction of the Court is to supply defects occasioned by mistake or inadvertence : not to supply omissions intentionally made.

MINUTE OF ORDER :—The Court being of opinion that the instrument did not operate in Equity as an execution of the power, allow the demurrer. Costs of all parties, as between solicitor and client, out of the fund.

Solicitors : Messrs. *Wordsworth, Blake, & Harris.*

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(1) 28 Beav. 504. 6 Jur NS 1278 (2) 5 Hare, 131.
(3) Kay, 385.

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Jan. 11.

PICKERING *v.* CAPE TOWN RAILWAY COMPANY.

Practice—Motion to dismiss—Voluntary Assignment.

A registered deed of assignment in trust for creditors executed by Plaintiff pending the suit does not cause an abatement as upon bankruptcy, so as to deprive the Defendant of his right to move to dismiss for want of prosecution.

Overruled Price v Richards, 9 Eq 35. V C J

THIS was a motion on behalf of the Defendants that the Plaintiff's bill might be dismissed for want of prosecution.

The bill was filed in 1864.

On the 30th of May, 1867, Plaintiff executed a deed, assigning all his estate and effects to *G. W. Hutchinson*, to be administered for the benefit of the creditors of Plaintiff as in bankruptcy, and this deed was duly registered on the 3rd of June, 1867, pursuant to the *Bankruptcy Act*, 1861.

On the 7th of November, 1868, the Lords Justices, affirming the decision of Mr. *Hazlitt*, held that the deed was not binding on dissentient creditors: *Ex parte Pickering* (1).

The Defendants thereupon served notice of motion to dismiss for want of prosecution.

In the affidavit of the Plaintiff's solicitor, filed in opposition to the motion, it was stated that by the deed of arrangement all the estate and interest of the Plaintiff in the suit, and the subject matter thereof, passed to and became vested, and now was vested, in *Hutchinson* as such trustee, and that Defendants were shortly afterwards served with notice of the filing of the deed, and, through their solicitors, very soon after its filing informed of the execution and registration thereof.

Mr. *Bedwell*, for the motion.

Mr. *A. E. Miller*, for Plaintiff in opposition to the motion:—

The motion is entirely misconceived. Whether the deed be binding or not upon dissentient creditors does not affect the principle that Defendants, with notice of a deed of arrangement, and

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(1) Law Rep. 4 Ch. 58

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that the suit has accordingly abated as upon a bankruptcy, are not entitled to make such a motion in the absence of the only person interested in the subject matter of the suit. In this respect there is no distinction between a voluntary assignment for the benefit of creditors and a bankruptcy, upon which the proper course is not to move as against the bankrupt to dismiss, but against the assignees that they file a supplemental bill within a given time, and in default that the bill stand dismissed: *Robinson* v. *Norton* (1).

SIR W. M. JAMES, V.C.:—

I am of opinion that the Defendants are right in their motion. In the absence of authority I cannot hold that a voluntary assignment has the same effect as a bankruptcy. There is nothing, as it appears to me, in such assignment to deprive the Defendants of their right to move. They have not lost that right, and there must be the common order to dismiss.

9 Eq 36

Solicitors: Messrs. *Meyrick, Gedge, & Loaden*; Messrs. *Courtenay & Croome*.

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(1) 10 Beav. 484.

M. R.
1869
Feb. 13.

In re IBBITSON'S ESTATE.

Real Estate—Conversion—Personal Estate in Expectancy.

A testator devised his real estate to trustees upon trust to pay the rents and profits thereof to his wife during her life, if she should so long continue his widow; and from and after her death or second marriage he declared that they should stand possessed thereof upon trust for his children who should be then living, and their respective heirs, as tenants in common, but subject to a power for the trustees, if they should in their discretion think fit so to do, to sell the said real estate; and in the event of such sale the trustees were to pay, divide, and apply the proceeds unto and among his children who should be then living, in equal shares. During the lifetime of the testator's widow one of his children assigned all his personal estate in possession, remainder, or expectancy, to trustees for the benefit of his creditors. Upon the widow's death the trustees of the testator's will, in exercise of the power therein contained, sold the real estate:—

Held, that the child's share of the proceeds did not pass to the trustees of the creditors' deed.

THOMAS IBBITSON, by his will, dated the 15th of January, 1840, after directing that his debts and funeral and testamentary expenses should be paid by his executors out of his personal estate, devised his real estate to trustees upon trust to pay the rents and profits thereof to his wife, *Jane Ibbitson*, during her life, if she should so long continue his widow, and from and after her decease or second marriage the said testator declared that the trustees should stand possessed of the said real estates in trust for all his children who should be then living, and their respective heirs, as tenants in common, subject to the proviso for the sale and disposition thereof thereinafter contained. The testator then proceeded to bequeath his personal estate (stock in trade excepted) upon trusts corresponding with those stated as affecting his real estate. And as to his stock in trade he gave the same to the trustees upon trust to sell the same, and to invest the money to arise by sale thereof, together with any other moneys which he might die entitled to and which should not be required for the payment of his debts or funeral or testamentary expenses, and to pay the interest thereof to his said wife during her life in case she should so long continue his widow, and from and after her decease or marrying again, upon trust to pay and divide the said principal money so to be placed out at interest unto and amongst all his children who should be then living, in equal shares. And he thereby declared that in case of the death of any one or more of his children before the death or marrying again, as the case might be, of his said wife, leaving lawful issue of his, her, or their body or respective bodies, then and in such case the trustees for the time being of his will should stand possessed of that part or share of his said real and personal estates and premises wherein each such deceased child would, if living, have been entitled as aforesaid, upon trust for the issue of such deceased child in manner therein mentioned. And it was thereby provided that it should be lawful for the trustees for the time being, if they should in their discretion think it expedient or proper so to do, and of their own proper authority, upon the death or second marriage of the testator's said wife, to sell and dispose of all or any part or parts of the said real or personal estates and premises respectively; and the testator declared that the trustees should pay, divide, and apply the moneys to arise by such sale and disposition, after deducting necessary expenses, unto and among all his children who should be then living, in equal shares, and the lawful issue of such as should be then dead, such issue to take in manner aforesaid. The testator died on the 6th of May, 1840.

Henry Ibbitson, one of the testator's children, by an indenture, dated the 4th of March, 1858, assigned certain specified personal estate (not including any interest he might have under his father's will) "and all other the personal estate and effects whatsoever and wheresoever of him, the said *Henry Ibbitson*, in possession, remainder, or expectancy," to trustees for the benefit of his creditors. In April, 1860, he took the benefit of the *Insolvent Debtors' Act.*

Jane Ibbitson died in October, 1867. Shortly after her death the trustees of the testator's will, in exercise of the power therein contained, sold the real estate of the testator, and got in certain outstanding personal estate; and they paid the share of *Henry Ibbitson* in the proceeds of such real and personal estate into Court under the *Trustee Relief Act.*

A Petition was presented by the trustees of the creditors' deed for payment of the whole fund to them.

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Mr. *Southgate*, Q.C., and Mr. *Bagshawe*, for the Petitioners:—

We admit that the testator by his will did not absolutely convert his real estate into personalty, but he gave the trustees a power of sale, and left it to their discretion to determine whether his children should take their shares as real or personal estate. The trustees have exercised that power. The share of *Henry Ibbitson* therefore comes to him as personalty, and passed to the Petitioners by the deed of 1858 under the description of personal estate in expectancy. [They referred to *Hobson* v. *Neale* (1).]

Mr. *R. W. E. Forster*, for the assignee in insolvency.

Mr. *W. C. Harvey*, for the trustees of the will.

LORD ROMILLY, M.R.:—

It is clear that there is no conversion. This cannot be treated as a trust for sale. I think that the produce of the land must go to the assignee in insolvency, not to the trustees of the deed.

Solicitors: Messrs. *Few & Co.*; Mr. *C. G. Rushworth*; Messrs. *Algernon Wells & Sykes*.

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1869
Jan. 15.

JOHNSON *v.* LANDER.

Husband and Wife—Judicial Separation—Wife's Chose in Action—20 & 21 *Vict.* c. 85, s. 25.

20 Eq 180-1,
7 Ch D. 51.
WN 69 28

By a decree of judicial separation the wife's *choses in action* not reduced into possession at the date of the decree become, under 20 & 21 Vict. c. 85, s. 25, her absolute property as if she were a *feme sole*.

Where a wife instituted a suit to enforce her equity to a settlement of a trust fund, and while the suit was pending obtained a decree of judicial separation from her husband on the ground of cruelty, the Court ordered the fund to be paid to her, and refused the husband his costs.

BY a settlement made in 1829, the sum of £948 4*s.* 3*d.* consols, was vested in trustees upon trust for *Martha Parton* for life, and upon her death upon trust for *Angelina*, *Maria*, and *Mary Ann Barbone*, in equal shares. In 1842, *Mary Ann Barbone* married

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(1) 17 Beav. 178.

John James Johnson. In 1858, *Maria Barbone* (then *Maria Moore*, widow) died. On the 19th of March, 1867, *Martha Parton* died. On the 22nd of March, 1867, *Angelina Barbone* died, intestate. On the 6th of April, 1867, Mrs. *Johnson* presented a petition in the Divorce Court for a judicial separation from her husband on the ground of his cruelty. On the 20th of the same month she instituted this suit, by her next friend, against the trustees of the settlement, her husband, and the executors of *Maria Moore*, for the execution of the trusts of the settlement, and for the settlement of her share of the trust fund upon herself and her children. Shortly afterwards the trustees transferred the fund into Court under an order in the cause. In February, 1868, the Judge Ordinary of the Divorce Court made a decree for judicial separation on the Plaintiff's petition, and she thereupon amended her bill, and prayed that her share of the fund might be paid to her absolutely. She subsequently obtained letters of administration to the estate of *Angelina Barbone.* The cause now came on to be heard on motion for decree.

Mr. *Bristowe* (Mr. *Karslake*, Q.C., with him), for the Plaintiff:—

The 25th section of the *Divorce Act*, 20 & 21 Vict. c. 85, provides, that in the case of judicial separation "the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her, and such property may be disposed of by her in all respects as a *feme sole;* and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead." The effect of that section is, that a decree for judicial separation is, as regards the wife's property, equivalent to the death of the husband, so that the wife's *choses in action* which have not been reduced into possession before the decree become her absolute property. Such *choses in action* cannot be said to have "come to or devolved upon" the wife until they are reduced into possession. In the case of dissolution of marriage the wife is absolutely entitled to her property not reduced into possession during the coverture: *Wells* v. *Malbon* (1); and there is

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(1) 31 L. J. (Ch.) 344. 31 Beav 48. 8 Jur N.S. 249

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no distinction, as regards the rights to property, between the two cases. The Plaintiff, therefore, is absolutely entitled to one-third of the fund; she is also entitled to another third, as administratrix of *Angelina Barbone*, and the remaining third is payable to the executors of Mrs. *Moore*. The husband has no interest in the fund and ought not to have appeared, and the Court will mark its sense of his misconduct, which led to the judicial separation, by refusing him his costs.

Mr. *Archibald Smith*, for the executors of Mrs. *Moore*.

Mr. *Jervis*, for the trustees and the husband:—

The 25th section of the *Divorce Act* applies only to property which the wife may acquire, or which may come to or devolve upon her, during the judicial separation; but the Plaintiff's third of this trust fund came to or devolved upon her at the death of *Martha Parton*, long before the decree for judicial separation. The Act says nothing about reduction into possession. The decree has not affected the rights of the husband and wife as to this fund, and the only equity is to have a settlement in the usual form upon the Plaintiff and her children. The husband was, and is, a necessary party to the suit, and is entitled to his costs.

Lord Romilly, M.R.:—

I am of opinion that this property not having been reduced into possession before the decree of judicial separation, is property which has come to or devolved upon the Plaintiff since the decree, and that she is, consequently, under the 25th section of the statute, entitled to it as if she were a *feme sole*. Her husband could have given a receipt for it before the judicial separation, and the 25th section transfers the right to receive it and the power of giving a receipt for it to the wife. The question is not very material in this case, for under the circumstances I should, probably, have settled the whole of it, without reference to the statute. I certainly shall not give the husband any costs.

Solicitors for the Plaintiff: Messrs. *Fielder & Sumner*.

Solicitors for the Defendants: Messrs. *Treherne & Wolferstan*; Messrs. *Morris, Stone, Townson, & Morris*.

In re BROWNE'S WILL.

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10 Eq. 587
13 Eq. 302
18 Eq. 441
20 Ch.D. 364

Marriage Settlement—Covenant to settle Future Property—Tontine Debentures—What constitutes Future Property.

A marriage settlement contained a recital of an agreement to settle all personal property which the wife should, at any time during the intended marriage become entitled to, and a covenant by the husband and the wife for the settlement of all personal property which the wife, or the husband in her right, at any time or times during the marriage should become possessed of or entitled to by transmission, gift, or otherwise, and whether in possession or expectancy.

Another marriage settlement contained no recital of any agreement as to the settlement of future property, but a covenant by the husband and wife to settle any personal property of the value of £200 or upwards which should at any time or times during the coverture be given or bequeathed to, or in any manner vest in, the wife.

In each case the wife was, under the will of her mother, entitled at the date of the settlement to the beneficial interest in an undivided share of four Irish tontine debentures. The holder of one of these debentures was entitled during the life of a person therein named to an annuity of £7 10*s.* Irish currency, and also to a proportionate share of all other annuities under similar debentures which might cease to become payable to the holders thereof by reason of the death of the *cestuis que vie* therein named. At the dates of the settlements the debentures were of small value; but ultimately large sums became payable thereunder. No mention was made of them in the settlements:—

Held, that no part of the annuities payable thereunder was included in either of the above-mentioned covenants.

CAROLINE SUSANNA BROWNE, widow, by her will, gave all her property to trustees upon trust after payment of her debts and funeral and testamentary expenses to pay and make over one moiety thereof to her son, and the other moiety to her five daughters in equal shares. The testatrix died in 1842.

Part of the property of the testatrix consisted of four Irish tontine debentures, issued under the authority of an Act of the Parliament of *Ireland*, passed in the session held in the 19th and 20th years of the reign of King *George* III. The owner of one of these debentures was thereby entitled, during the life of the person therein named, to an annuity of £7 10*s.* Irish currency; and was also entitled, during the same life, to a share of all annuities which might cease to be payable to the holder of any other debenture issued under the Act by reason of the death of the person named in such debenture. At the death of the testatrix these debentures were of very little value; and when her estate was wound up in all other respects it was not considered necessary to make any formal assignment thereof to her son or daughters, but they remained vested in trustees, and the income derived from them was from time to time divided amongst the persons entitled thereto. In consequence, however, of the person named in the debentures having attained a great age, a large sum became in 1868 payable thereunder.

Previously to the marriage of one of the daughters of Mrs. *Browne* with *Thomas Ingle*, a settlement was executed, dated the 5th of February, 1844. This settlement, after a recital, amongst others, of an agreement that all and singular the personal property which Mrs. *Ingle* should at any time during the intended marriage become entitled to should be settled and assured in manner thereinafter mentioned, contained an assignment by Mrs. *Ingle* to trustees of certain property therein specified, not including her interest in the tontine debentures; and also a covenant which, so far as is material, is in the following terms:—"It is hereby agreed and declared between and by the parties hereto that all and singular the moneys, stocks, goods, and chattels, and other personal estate which at any time or times during the said intended marriage," Mrs. *Ingle*, or her husband in her right, "shall become possessed of, or entitled unto, by transmission, gift, or otherwise, and whether in possession or expectancy, shall immediately after she or he shall so acquire the same be duly assigned" to the trustees of the settlement upon the trusts therein mentioned.

Previously to the marriage of another daughter with *William Scott Carter*, another settlement was executed, dated the 3rd of July, 1849, which after a recital (amongst others) of an agreement that the "future real and personal estate" of Mrs. *Carter* should be settled and assured in manner thereinafter mentioned, contained an assignment by Mrs. *Carter* of certain specific property, not including her interest in the tontine debentures; and also a covenant which was, *mutatis mutandis*, identical with that contained in the marriage settlement of Mr. and Mrs. *Ingle*.

Previously to the marriage of a third daughter, Miss *Juliana Browne*, with Mr. *Roger Kynaston*, a settlement was executed, dated the 13th of September, 1851. The recitals did not mention the tontine debentures, nor refer to any future property of Mrs. *Kynaston*. After an assignment of certain specific property, not including Mrs. *Kynaston's* interest in the tontine debentures, there followed joint and several covenants by Mr. and Mrs. *Kynaston*, expressed to be "in pursuance of the said agreement in this behalf" (which agreement, however, did not otherwise appear) in the following terms:—"That in case the said intended marriage shall be had and solemnized, and any personal property of the value of £200 or upwards at any one time (except jewels, trinkets, ornaments, plate, pictures, prints and books, which it is hereby declared shall belong to the said *Juliana Browne* for her separate use), shall at any time or times during the said intended coverture be given or bequeathed to, or in any manner vest in, the said *Juliana Browne*, or in the said *Roger Kynaston* in her right, then and in such case, and so often, they the said *Roger Kynaston* and *Juliana Browne* respectively, and their respective executors and administrators, shall and will, at the costs and charges of such property, make and execute all such acts and assurances as shall be necessary for duly and effectually assigning or transferring the same unto, and vesting the same in "the trustees of the settlement upon the trusts therein mentioned."

In 1868, the trustees of the debentures paid into Court, under the *Trustee Relief Act*, a sum of £1873 2*s.* 4*d.*, being the amount of the shares of Mrs. *Ingle*, Mrs. *Carter*, and Mrs. *Kynaston*, in a larger sum received by the trustees in respect of the tontine debentures. A Petition was now presented by these ladies and their husbands praying that the opinion of the Court might be expressed as to the effect of the covenants in the marriage settlements upon the fund; and that the same might be paid either to the husbands or to the trustees of the settlements as the Court might determine to be proper.

Mr. *Jessel*, Q.C., and Mr. *Cookson*, for the Petitioners:—

The interests of these ladies in the tontine debentures were vested in them at the dates of their respective settlements, although

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the value thereof might afterwards be increased. The covenants extend only to property acquired after the marriages: *Wilton* v. *Colvin* (1); *Archer* v. *Kelly* (2). In *Grafftey* v. *Humpage* (3), and *Re Hughes' Trusts* (4), similar covenants were held to include reversionary interests: but the interests of these ladies were not reversionary. *Maclurcan* v. *Lane* (5) was a case which turned on the meaning of the word "accrue," and does not govern the present. In *Ex parte Blake* (6) the property was not vested at the time of the marriage, and the case is therefore distinguishable.

[*Hoare* v. *Hornby* (7), and *Dering* v. *Kynaston* (8), were also referred to.]

Mr. *Gregory*, for the trustees of the debentures.

Mr. *Eddis*, for the trustees of the marriage settlements:—

Under Mrs. *Browne's* will the trustees thereof were to pay, assign, and make over the property comprised therein to these ladies. At the time when the settlements were made, no such assignment of the debentures had been made. In the first two settlements all property of which the ladies might become "possessed by transmission, gift, or otherwise"—all property, therefore, which it afterwards became the duty of Mrs. *Browne's* trustees to distribute amongst these ladies—fell under and was bound by the covenants. In the third settlement the words are, "shall in any manner vest." Although these ladies had in a sense vested interests in these debentures, still the property remained outstanding in trustees, and is bound by this covenant also.

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Jan. 11. LORD ROMILLY, M.R., after stating the facts and reading the covenant in Mr. and Mrs. *Ingle's* settlements, continued:—

The question is, whether this fund is included in the covenant I

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(1) 3 Drew. 617. 2 Jur NS 867
(2) 1 Dr. & Sm. 600, 6 Jur NS 814
(3) 1 Beav. 46.
(4) 4 Giff. 432.
(5) 5 Jur. (N.S.) 56.
(6) 16 Beav. 463.
(7) 2 Y. & C. 121.
(8) Law Rep. 6 Eq. 210.

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have read. Though the tontine existed at the date of the settlement, and these four debentures were then existing, they are not mentioned in, or assigned by, the settlement; and I am of opinion that they are not comprised within the terms of the covenant. It is clear that the covenant points to after-acquired property; that is, property which the lady, or her husband in her right, should afterwards become possessed of or entitled to. The lady was at that time both possessed of and entitled to this property. The fact that from the nature of the property and the accident of the long life of the *cestui que vie*, it became more valuable year by year, does not, in my opinion, affect the question any more than if she had been possessed of a mine at the time of the settlement which subsequently became of very great value. This was a property of very doubtful value, it might cease at any time by the death of the *cestui que vie*, or it might, as it did, become every year more valuable, until it amounted to a very large sum.

The words of the settlement certainly indicate futurity; this is settled by *Wilton* v. *Colvin* (1); and if the parties to the settlement had intended to settle these tontine debentures they would have done so by mentioning them in the settlement. The case of *Archer* v. *Kelly* (2) is a distinct authority for not including these debentures within this covenant.

The next case to be considered is that of Mrs. *Carter's* settlement. [His Lordship then stated it, and continued :—] This is governed by my decision in the last case, and the authorities I have referred to. The covenant clearly indicates future property, and not the varying and increasing produce of existing property, which they did not think fit to include by terms in the settlement.

[His Lordship then stated Mrs. *Kynaston's* settlement, and continued :—] This is not quite so clear as the others, but I think that the words "shall at any time during the said intended coverture be given, or bequeathed to, or in any manner vest," point to a future acquisition of property, and not to an increase of value in property at that time existing, which possible increase was known to everyone, and was as much Mrs. *Kynaston's* as the certain income. If I were to hold otherwise, it would include every species of payment of interest or dividend which might become due after the

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(1) 3 Drew. 617. 2 Jur N.S. 867

(2) 1 Dr. & Sm. 300. 6 Jur N.S. 814

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marriage. This, I am of opinion, is not the true construction of the settlement; and no part of the tontine debentures was intended to be, or is, included in any one of the covenants contained in these indentures.

Solicitors: Messrs. *Price, Bolton, & Filder.*

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STARR *v.* MAYOR, ALDERMEN, AND COMMONS OF THE CITY OF LONDON.

London (*City*) *Improvement Act,* 1847 (10 & 11 *Vict. c. cclxxx.*)—*Compensation for Land—Assessment—Separate Interests claimed by one Person.*

Upon the construction of sects. 20 and 21 of the *London* (*City*) *Improvement Act,* 1847, a person having several distinct interests in one property, or in several distinct properties, taken under the powers of the Act, is not entitled to object to having the compensation for all such interests assessed by one jury and in one trial.

THE Plaintiff, *Richard Benjamin Starr,* was in January, 1868, the lessee, under a lease from *Cyrus Clark* and *James Clark,* dated the 25th of March, 1863, for twenty-two and a half years, from Michaelmas, 1862, of two houses, Nos. 4 and 5, *Farringdon Road,* in the city of *London,* which he had occupied since the year 1860 as a hotel, called "*Starr's Temperance Hotel and Coffee and Dining Saloon.*" He was also the assignee under an assignment made in 1866 of the lease of the house, No. 87, *Snow Hill,* in the city of *London,* of which the trustees of the parish of *St. Sepulchre* were the lessors, for the residue of a term of years, of which eighteen and a half years were unexpired at Lady Day, 1868, and he occupied this house as a coffee and eating-house under the name of "*The Working Men's Coffee and Dining Rooms.*"

The corporation of *London* were empowered by the *Holborn Valley Improvement Act,* 1864, in which the provisions of the *London* (*City*) *Improvement Act,* 1847, are (with some immaterial variations) incorporated (1), to take all these houses for the purposes of the Act, and on the 23rd of January, 1868, they served the Plaintiff with a notice to treat for the purchase of his estate and interest in the three houses, and for compensation for the injury or damage to be sustained by him on account of the execution of the Act.

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(1) The 20th and 21st sections of the *London* (*City*) *Improvement Act,* 1847, relating to the compulsory purchase of lands, will be found in the report of *Abrahams* v. *Mayor, Aldermen, and Commons of the City of London,* Law Rep. 6 Eq. 625.

On the 9th of March, 1868, the Plaintiff sent in a statement of his claims in respect of Nos. 4 and 5, *Farringdon Road*, which amounted to £9235, and a separate statement of his claim in respect to No. 87, *Snow Hill*, which amounted to £4497.

The corporation then offered him £4600 for his interest in both the properties, which he refused to take.

On the 23rd of December, 1868, the Lord Mayor issued a precept to the Sheriffs of *London* commanding them to summon a jury to the Lord Mayor's Court on the 7th of January, 1869, "to assess, ascertain, and give a verdict for the sum or sums of money to be paid for the purchase of, or in satisfaction or recompense for, the value of the leasehold estate and interest to which *Richard Benjamin Starr* claims to be entitled of and in the piece or parcel of ground, with the messuages, or tenements, warehouses, and appurtenances thereupon erected, situate and being Nos. 4 and 5, *Farringdon Road*, and known as "*Starr's Temperance Hotel*," and No. 87, *Snow Hill*, in the parish of *Saint Sepulchre*, in the city of *London*, the said premises being premises mentioned and described in the plan and book of reference referred to in the said Act, and which the Mayor, Aldermen, and Commons of the said City in Common Council assembled are, by virtue of the said Act and the Acts incorporated therewith or extended thereto, empowered to take and use for the purposes thereof, and in respect of which the said Mayor, Aldermen, and Commons, by their duly authorized agent, gave due notice in writing, on the 23rd day of January, 1868, to the said *Richard Benjamin Starr* of their intention to take the same for the purposes of the said Act; and also for the compensation to be made to the said *Richard Benjamin Starr* in respect of any improvements, fixtures, injury, or damage whatsoever, to be lost or sustained by him, the said *Richard Benjamin Starr*, as occupier of the said premises, on account of the execution of the said Act, the particulars of which estate and interest, improvements, fixtures, injury, or damage, together with the amount

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of the sum of money which he, the said *Richard Benjamin Starr*, expected and was willing to receive as compensation for such improvements, fixtures, injury, or damage respectively, are contained in the statements in writing dated the 9th day of March, in the year of our Lord 1868, and delivered in pursuance of the said Act at the office of the Comptroller of the said City."

On the 29th of December, 1868, the Plaintiff was served with notice that the Sheriffs would proceed to nominate the jury, pursuant to the precept, on the 30th of December; and on the following day the Plaintiff filed the bill in this suit, claiming a right to have the purchase-money and compensation in respect of the two separate properties separately assessed, and praying for a declaration of such right, and an injunction to restrain the corporation from taking any further proceedings under the precept and notice of trial, and from taking possession of the premises until the purchase and compensation-money for the two properties should have been separately assessed.

The Plaintiff having obtained an interim injunction *ex parte*, in the Vacation, now moved upon notice for an injunction in the terms of the prayer of the bill.

Mr. *Jessel*, Q.C., and Mr. *Bury*, for the Plaintiff:—

The true construction of the *City Improvement Act*, 1847, requires that every separate claim in respect of property taken by the corporation shall be assessed separately: *Abrahams* v. *Mayor, &c., of London* (1). In that case there were several persons having separate interests in the same property, but the principle applies equally to the case of one person having separate interests in two distinct properties. The Vice-Chancellor says that the claim for compensation is the declaration on which the whole proceedings turn; here the Plaintiff has properly made two distinct claims, and upon each of them there must be a separate trial and a separate verdict. Suppose a man to be tenant for life of *Whiteacre* and tenant in tail or in fee of *Blackacre*, and both properties are taken under the Act, is the value of the two interests to be assessed in a lump sum? The object of the Defendants in seeking to assess the two properties together is to prejudice the Plaintiff's claim in respect of the old-established business in *Farringdon Road*, by mixing it up with his claim in respect of the property in *Snow Hill*, which he has more recently acquired.

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(1) Law Rep. 6 Eq. 625.

Mr. *Swanston*, Q.C., and Mr. *A. E. Miller*, for the Defendants, were not called upon.

Lord Romilly, M.R.:—

I think the words of the Act of Parliament are distinct upon the subject, and that all that Vice-Chancellor *Giffard* intended to lay down in *Abrahams* v. *Mayor, &c., of London* (1), was this:—That where there are different persons having different estates and interests in the property taken, then the persons taking the property are not entitled to lump these estates and interests together before a jury, and leave it to the different parties interested to divide among themselves the sum of money awarded by the jury, or to have a fresh jury to determine what aliquot share belongs to each; but when there is only one person, who has different claims and different interests in the property, or in different properties, all of which are taken by the corporation, then I am of opinion that they are entitled to assess them all together.

I am satisfied that this is a case in which the injunction cannot be sustained, and I must, therefore, refuse this motion with costs.

Solicitors for the Plaintiffs: Messrs. *Holmer, Robinson, & Stoneham.*

Solicitor for the Defendants: Mr. *Nelson*, City Solicitor.

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(1) Law Rep. 6 Eq. 625.

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Jan. 25, 26, 27.

8 Eq 447
10 Eq 462.
22 Ch D 124

In re CHINA STEAMSHIP COMPANY.
Ex parte MACKENZIE.

Company—Winding-up—Debenture—Assignment—Rights of Assignee—Calls—Set-off—Companies Act, 1862, *s.* 75.

After a company has commenced to be wound up, a shareholder can assign a debt due to him by the company only subject to a right of set-off by the company of all calls which may be made subsequently to the assignment and previously to the payment of the debt.

A company commenced to be wound up in December, 1866. On the 1st of March following a shareholder assigned five debentures of the company, and notice of the assignment was given to the liquidator on the same day. In June, 1867, and February, 1868, calls were made on the assignor for amounts exceeding what was due on the debentures:—

Held, that the calls not having been paid, the assignee was not entitled to prove against the company on the debentures.

Grissell's Case (1) commented on.

THIS was a claim by Mr. *J. T. Mackenzie* to be admitted to prove against the *China Steamship and Labuan Coal Company, Limited*, for £1160 and interest claimed to be due to him on fifteen debentures issued by the company. The liquidator of the company resisted the claim to the extent of £210 and interest alleged to be due on five of these debentures.

The five debentures in question all bore date the 22nd of May, 1865, and were in the form of covenants by the company with *John Black Low*, his executors and administrators, to pay to him, his executors, administrators, or assigns, the sums therein specified on the 1st of January, 1872, together with interest as from the 1st of January, 1865. *Low* was the holder of sixty shares in the company.

On the 19th of December, 1866, a resolution requiring the company to be wound up voluntarily was duly confirmed.

On the 1st of March, 1867, *Low* assigned the five debentures to *Mackenzie*, and on the same day notice of the assignment was given to the liquidator.

In June, 1867, and February, 1868, calls were made on the shareholders, and in respect of these calls *Low* was indebted to the company in the sum of £415 10*s.* 7*d.*

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(1) Law Rep. 1 Ch. 528. 12 Jur NS 718

In August, 1867, an order was made directing the winding-up to be carried on under the supervision of the Court.

Mr. *Jessel*, Q.C. (Mr. *Rodwell* with him), for *Mackenzie* :—

The calls were not made until long after the assignment, and therefore cannot be set off against the debt due on the debentures, even if set-off were one of the equities subject to which the assignee of a chose of action must take. But, in truth, set-off is not one of these equities, which must be attached to the chose in action itself; for example, if the debentures in question had been fraudulently issued, the assignee must have taken subject to that, but set-off is a mere personal equity existing between the debtor and creditor.

Mr. *Roxburgh*, Q.C., and Mr. *Wickens*, for the liquidator:—

The assignee of a debenture takes subject to all equities existing between the assignor and the company, and not merely to equities attaching to the debenture. The law is expressly laid down to this effect: *In re Natal Investment Company* (1). In this respect the assignee of a debenture is in a totally different position from the assignee of an overdue bill of exchange; and there is no ground for holding that the instruments in question are bills of exchange, as was held in *In re General Estates Company* (2).

By virtue of the 75th section of the *Companies Act*, 1862, *Low* became, immediately on the commencement of the winding-up, indebted to the company in the amount which he was liable to contribute to the assets of the company; therefore he was at the date of the assignment indebted to the company in the amount unpaid on his shares. It is true that such debt was payable only as calls might be made; but that does not affect the present question. If an action were now brought on these debentures by *Low*, he could only recover subject to the payment of this debt; and as the debt was in existence at the date of the assignment, *Mackenzie*, who can only prove in *Low's* name, can stand in no better position.

(1) Law Rep. 3 Ch. 355.

(2) Law Rep. 3 Ch. 758.

[*In re Rhos Hall Iron Company*, before the Master of the Rolls on the 16th of July, 1868, was referred to.]

Mr. *Jessel*, in reply :—

If *Mackenzie* were to sue the company on these bonds at law, there could be no set-off: *Watson* v. *Mid-Wales Railway Company* (1). It was laid down in *Grissell's Case* (2) that until a call is made there is nothing more than a liability to contribute: consequently there was no debt actually due from the company at the date of the assignment; and if the company had declared a dividend before June, 1867, it must have been paid, even to *Low*, notwithstanding his liability.

But, at all events, it was held in *Grissell's Case* that a shareholder was entitled to a dividend on paying his calls. A shareholder is therefore entitled to prove his debt; and that is all I ask here. The question as to the amount to be paid on the proof must be raised hereafter.

Mr. *Roxburgh*, in reply, on the cases cited by Mr. *Jessel* :—

Watson v. *Mid-Wales Railway Company* had nothing to do with the *Companies Act*, 1862, on which the whole question in this case turns; and besides, in that case the lease under which the Defendants claimed a set-off was not in existence at the time when the bond was given to the Plaintiff.

Jan. 27. Lord Romilly, M.R. :—

The question that arises upon this summons is, whether a certain debt due upon a debenture can be proved without a call which has been made being set off against it. There is no doubt that the debt can be proved as an amount due from the company, and the only question is, whether it can be set off against an amount due from the person himself to whom the debt is owing.

I must state the dates in order to explain the view I have taken of this case. In the first place, the voluntary winding up of the company began on the 19th of December, 1866. After the voluntary winding-up had begun (and this is a very important consideration), Mr. *Low*, who was the owner of the debenture, assigned it to Mr. *Mackenzie*, who is the applicant upon the present occasion. That was done on the 1st of March, 1867; two months and a half after the date of the winding-up. In June of the same year 1867, a call was made upon *Low* payable in July, 1867, but the call was not paid. Then, on the 8th of August, 1867, the order was made for continuing the winding up of the company under supervision.

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(1) Law Rep. 2 C. P. 593.

(2) Law Rep. 1 Ch. 528. 12 Jur. N. S. 716

I have first to consider what is the nature of this debenture. It does not pass by delivery simply, and can, therefore, only be assigned subject to the equities between the parties. What is meant by the equities between the parties? In my opinion (and all the cases shew it) it means the equities subsisting at the date of the assignment. It is not subject to any subsequent equity; it is not subject to any debt which arose subsequently; it is not subject to any debt which became afterwards due upon a previous contract;—all that is quite established. But the only question is, whether this call was a debt due from *Low* at the date of the assignment in March, 1867. If it was, then I am of opinion it is properly set off against the debenture, and that it comes within the equities subsisting between *Low* and the company. It is only an equitable assignment. According to the ordinary course of law the call would be a debt that could not be set off. The question is, whether Parliament has made it so. If it has been made so by Parliament, it is by the 75th section of the *Companies Act*, 1862; and the question, in my opinion, is, what is the meaning of that section, which is as follows:—"The liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt (in *England* and *Ireland* in the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time, or respective times, when calls are made, as hereinafter mentioned, for enforcing such liability"? There are a few more lines that I will read presently; but in the first place I will stop there. The enactment is, that in the event of the company being wound up, and in that event only, a debt is created due from the shareholder, but payable at the time when

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the calls are made. Then, it proceeds thus: "It shall be lawful in the case of the bankruptcy of any contributory to prove"—not to enter a claim, but to prove—"against his estate the estimated value of his liability to future calls as well as calls already made." The question is, whether that enactment does not create a debt which is *debitum in presenti, solvendum in futuro;* and I am of opinion that it does. In the first place, I think the object of the Legislature in enacting this clause was to prevent the very thing that occurs in this case; and I do not know any other reason for its introduction. Of course no question arises where the assignment takes place before the winding-up; but if the winding-up should take place before the assignment of the chose in action, then, in my view of the case, it is provided that after the winding-up has taken place, and before any calls are made, the owner of the debenture shall not be at liberty to assign it, and get money which he can dispose of, so that when the call is made he has nothing which can be made available to pay it. It is clear that this is so in Bankruptcy, because the clause there provides that the call may be actually proved, and if it is proved against the bankrupt shareholder, it would be liable to the usual set off against any money that was due to him. A case has recently been decided which shews clearly that the calls may be proved in Bankruptcy—I mean the case of *Ex parte Pickering* (1). [His Lordship read the head-note, and the judgment of Sir *W. Page Wood,* L.J.]

Now that is very important, because it disposes of the case so far as Bankruptcy is concerned. Is there any decision to the contrary? The case that was very much relied on is the case of *Ex parte Grissell* (2). In my opinion it does not affect this case in the slightest degree. In point of fact, the decision in that case is little more than this, that the rule in winding-up cases is, that a man must pay in full the calls which he owes to the company, and then he receives a dividend upon what is due to him. But it was contended that the observations of the Lord Chancellor in *Grissell's Case* affected the present case. I do not think they do so. That case merely says this:—When dividends are payable and no calls have been made, the creditor is entitled to receive his dividend; *non constat* that any call will be made, and you cannot, therefore, make

(1) Law Rep. 4 Ch. 58.

(2) Law Rep. 1 Ch. 528. 12 Jur N.S. 718

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any alteration upon that account. But, on the other hand, it is not laid down by that case (and, indeed, I should be much surprised if it had been), that if at the same moment there was a dividend of £100 due to *A.*, and at the same time £100 due from *A.* for a call, you could not set off the one against the other, the one being due to the company and the other from the company. I do not say how the dividend is to be ascertained, but I am supposing there was actually that sum due from the one to the other.

Now what Lord Chancellor *Chelmsford* says is this (1): "How are the calls made upon them to be dealt with? In the first place, I think that they cannot be required to pay up the full amount remaining unpaid upon their shares. The 75th section of the Act enacts 'that the liability of any person to contribute to the assets of a company in the event of its being wound up shall be deemed to create a debt due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability.' Until the call is made there is nothing more than a liability to contribute. This, indeed, creates a debt, but the debt does not accrue due till a call is made. The power to make calls is only to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves. But if the whole of the amount unpaid upon the shares were required to be paid up, more might be raised than would be requisite for these purposes; and it might be that a contributory thus paying in advance might lose all that he had so paid in the event of any of his co-contributories becoming insolvent." In fact, all that that case and those observations decide, amounts to this,—that when a dividend is declared to be due it must be paid, and when a call is made you must pay that call, totally irrespective of the fact that a call may or may not be made at any future time, and a dividend may or may not be paid at a future time. But it does not decide that when there is a debt due on the one side and a call due upon the other, that you cannot set off the one against the other. Assuming that in this case the amount due upon the call had been a totally different debt, and that the amount had been due from

(1) Law Rep. 1 Ch. 535. 12 Jur N S 719

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Low to the company at the time he made the assignment, could anybody contend that, when he came to prove for the debt due on the debenture, the company could not set it off against the debt he owed to the company? It is clear that *Mackenzie* can stand in no better situation than *Low*. If so, the question resolves itself, as I said before, into what is the construction of the 75th section of the Act of Parliament? Does this section of the Act of Parliament effect what in equity would not have been the case without such an enactment, does it make the liability a debt? Does it say this, that when a call is made it has reference back, and that the debt becomes due at the time the winding-up began? I think it does, and this is what I understand to be the effect of this clause. If so, then upon a call being made it may be set off against a debt due to the company.

It appears to me that this is the construction of the section introduced to meet this very case. It was to prevent shareholders avoiding payment of calls by disposing of claims against the company when a winding-up became imminent.

I am of opinion, therefore, that the proof must be reduced by £210.

Solicitor for *Mackenzie*: Mr. *R. Wilkins*.

Solicitors for the Official Liquidator: Messrs. *Mackenzie & Trinder*.

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Jan. 30.

FREELAND *v.* PEARSON.

Sale under Order of Court—Legal Estate—Conveyance.

Upon a sale under the order of the Court, the purchaser will not be compelled to accept an equitable title without the legal estate being got in, except, perhaps, in a case where a dry legal estate is outstanding in an infant.

THIS was a summons to settle the draft conveyance of certain property which had been sold under an order of the Court.

Benjamin Linsey, the testator in the cause, by his will dated the 7th of January, 1841, appointed his wife, *Elizabeth L. Linsey*, executrix, and gave her for her sole use during her life all his property, both real and personal, and he directed her to pay his funeral expenses and debts, and at her decease to make such distribution and disposal of all his then remaining property among his children as might seem just and equitable. The testator died on the 9th of January, 1841, leaving his widow and eight children him surviving.

Elizabeth L. Linsey, by her will, dated the 8th of August, 1861, gave all the property of which she had power by her late husband's will to make distribution and disposal to trustees in trust for the children *nominatim*.

Joseph Linsey, one of the children, by an indenture dated the 13th of April, 1857, assigned and transferred all his part, share, and interest, whether in remainder or reversion, to which he should or might become entitled under or by virtue of the will of *Benjamin Linsey* to *Mary Brittain*, her executors, administrators, and assigns, by way of mortgage to secure repayment of £100 and interest.

Thomas B. Linsey, another of the children, by an indenture dated the 21st of November, 1853, in consideration of £500 expressed to have been advanced to him by *William Holden*, granted and assigned unto *William Holden*, his executors, administrators, and assigns, all the part or share, parts or shares, which he then was, or thereafter should or might be or become entitled to in possession, reversion, remainder, or expectancy, in any manner howsoever, of and in the real and personal estate of *Benjamin Linsey*, to hold unto *W. Holden*, his heirs, executors, administrators, and assigns, subject to redemption, on payment of £500 and interest.

Holden died shortly after the date of the last-mentioned indenture, and his widow, *Hannah Holden*, became his legal personal representative.

By an indenture dated the 20th of March, 1855, and containing a recital to the effect that the sum of £500 mentioned in the indenture of the 21st of November, 1853, was, in fact, the money of *John Troup*, *Hannah Holden* assigned the mortgage debt of £500, and all the part or share, parts or shares, which by the said indenture were assigned or otherwise assured unto *W. Holden*, to *John Troup*, his executors, administrators, and assigns.

Under the decree in the cause, *Troup* had come in and proved his charge on the share of *T. B. Linsey*.

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The testator's property consisted of both freeholds and leaseholds, and was directed to be sold by the order made on further consideration. It was accordingly put up for sale in lots, under conditions which provided that the purchaser should bear the expense of tracing and getting in all outstanding legal estates (if any); and that no purchaser should require for any purpose the concurrence of any person in respect of any equitable or beneficial interest bound by the order of sale.

This summons related to the conveyance of Lot 4, which comprised both freeholds and leaseholds. The draft as settled on behalf of the purchaser made *Mary Brittain*, *John Troup*, and the heir-at-law of *Holden*, parties. The Defendants, having the carriage of the order for sale, objected that these persons were unnecessary parties to the conveyance, and took out the summons, which was adjourned into Court.

Mr. *W. R. Ellis*, in support of the summons:—

The purchaser is precluded from requiring *Troup's* concurrence by the conditions of sale. *Troup's* interest is merely equitable, and he has come in under the decree, and is bound by the order of sale.

The assignment by *Joseph Linsey* is to *Mary Brittain*, "her executors, administrators, and assigns": under these words *Mary Brittain* could take no legal estate, at all events in the freeholds: if, indeed, *Joseph Linsey* had at the date of the assignment any legal estate which he could pass. The same observations apply to the mortgage to *Holden*.

Further, the heir-at-law of *Holden* has a mere dry legal interest, and the sale being by order of the Court, the purchaser will be compelled to take an equitable title: *Craddock* v. *Piper* (1). It is expressly laid down by Lord *St. Leonards* that the Court will compel a purchaser under a decree to accept such a title, but, if he afterwards sell the estate, will not enforce specific performance against the second purchaser: *Sugden's* Vendors and Purchasers (2).

Mr. *Langley*, for the purchaser, was not called upon.

(1) 14 Sim. 310.

(2) 14th Ed. p. 397, pl. 37.
13th Ed 389 pl 32

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LORD ROMILLY, M.R. :—

I think that the purchaser is precluded by the condition from requiring *Troup*'s concurrence: he appears to have only an equitable interest, and is bound by the order for sale. But with respect to *Mary Brittain* and the heir-at-law of *Holden,* I think they have legal estates in them, or, at all events, the point is so doubtful that I think the vendor should procure them to concur. The expense of doing so is another question, and one which I am not now called upon to decide.

I think the notion that the Court of Chancery will compel a purchaser to take an equitable title without the legal estate is without foundation. Upon referring to *Sugden's* Vendors and Purchasers, that does not appear to be his opinion. The utmost Lord *St. Leonards* says is this (1): "The rule that a purchaser will not be compelled to take an equitable title does not extend to estates sold under the decree of a Court of Equity, where the legal estate is vested in an infant." I take the distinction to be between title and conveyance. The Court will compel a purchaser to take an equitable title when it sees that the legal estate can be got in. Where the legal estate is outstanding in an infant, the purchaser must take a conveyance from the persons who are equitably entitled, and then he can get in the legal estate.

Therefore unless the purchaser insists on the concurrence of *Troup,* the summons will be dismissed with costs.

Troup's concurrence was not insisted on.

Solicitors: Messrs. *Wrentmore & Son;* Mr. *J. Harris.*

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(1) Sug. V. & P. 14th Ed. p. 397, pl. 34.
15 Ed 329 pl 29

V.-C. S.
1869
Feb. 11.

NANSON *v.* BARNES.

Customary Freehold—Breaking the Descent ex parte Maternâ.

B. conveyed customary freeholds, which he had inherited from his mother, to *N.* absolutely, and *N.*, after surrender and admittance, executed on the same day a deed of declaration of trusts for such person as *B.* should by deed or will appoint, and in default for *B.* and his heirs, this process being necessary according to the custom to give *B.* the power of devising. *B.* died intestate:—

Held, that the descent had not been broken, and that the heir of the testator *ex parte maternâ* was entitled.

GEORGE BLAMIRE, who died in September, 1863, by his last will, dated the 6th of June, 1834, gave all his real and personal estates (subject to certain annuities and legacies) unto Sir *James R. G. Graham*, Bart., absolutely. Sir *James Graham* having died in the lifetime of the testator, the devises and bequests contained in the will lapsed. A bill was filed in April, 1864, by the executors of the will for the administration of the estate, and a decree for that purpose was made in June following. The testator was, *inter alia*, entitled to parcels of customary lands, which he held of the manor of *Botchardgate*, otherwise *Prior Lordship, Cumberland*, to him and his heirs, according to the custom of that manor. The Chief Clerk certified that *Mary Ann Lowry* and *Eliza Lowry* were the co-heiresses at law of the testator *ex parte paternâ;* that the Rev. *William Hawkes Langley* was the heir-at-law *ex parte maternâ;* and that *Mary Ann Lowry* was the heiress of the testator, according to the custom of the manor of *Botchardgate, ex parte paternâ;* and the Rev. *W. H. Langley* heir *ex parte maternâ;* and that the testator held these parcels of lands of the said manor by descent from his mother, and that they descended to the customary heir *ex parte maternâ.*

This was an adjourned summons taken out on the part of *Mary Ann* and *Eliza Lowry*, that the certificate might, *inter alia*, be varied, by certifying that the testator was entitled to such lands as purchaser, and that the same descended to his heir *ex parte paternâ.*

The evidence shewed that the testator's mother was, at a Court holden for the manor on the 19th of October, 1815, admitted tenant to these lands as the only daughter and customary heiress of *Thomas Harrington*, and that on the 2nd of May, 1832, the testator was admitted tenant as only son and heir-at-law of his mother; further, that on the same day, by an indenture of customary conveyance made between *George Blamire* of the one part, and *William Nanson* of the other part, these lands were, for a nominal consideration, granted, bargained, and sold unto *William Nanson*, his heirs and assigns, to hold the same unto him, his heirs and assigns, to the only proper use and behoof of *William Nanson*, his heirs and assigns for ever, according to the custom of the manor. The indenture was executed by both parties. The lands were on the same day surrendered by the grantor into the hands of the lord to the use of *William Nanson*, his heirs and assigns, and *William Nanson* was on the same day admitted tenant. On the same day *William Nanson* and *George Blamire* executed an indenture of declaration of trusts, which, after reciting, *inter alia*, the former deed, and that *William Nanson* had been admitted tenant, witnessed that the customary conveyance was made to *William Nanson* that he and his heirs should be seised of the lands upon trust for such persons as *George Blamire* by any deed or his last will should appoint, and in default thereof in trust for *George Blamire*, his heirs and assigns for ever, according to the custom of the manor. This process was necessary according to the custom in order to give the owner the power of devising.

Mr. *Dickinson*, Q.C., and Mr. *Fry*, for the Misses *Lowry*:—

The testator at his decease was seised of these lands as purchaser. If a man derived a freehold estate from his mother as her heir, and conveyed it to a trustee, and then took it back by a reconveyance, the descent was broken. The subsequent title was a new one, and in the event of intestacy the estate would descend to the heir *ex parte paternâ*, and this customaryhold estate having been bargained, sold, and conveyed to another person, and he having by a distinct deed declared that he held it upon trusts to be declared by the testator, and in default of appointment for the testator and his heirs, it had in the events which had happened devolved upon his heir *ex parte paternâ*. The testator acquired a

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new title by the distinct deed of the trustee, and the descent of the estate was consequently broken. In *Coke* upon *Litt.* (1), the cases where heirs upon the part of the mother could take, and where not, were mentioned, and it was said that "if a man be seised of lands as heire of the part of his mother, maketh a feoffment in fee, and taketh backe an estate to him and to his heires, this is a new purchase, and if he dyeth without issue, the heires of the part of the father shall first inherite;" and, further, it was said (2) that "a man so seised as heire on the part of his mother, maketh a feoffment in fee to the use of him and his heires, the use being a thing in trust and confidence, shall ensue the nature of the land, and shall descend to the heire on the part of the mother." It was quite clear that the whole legal and equitable estate was parted with by the testator to *Nanson*, and these two paragraphs contrasted, shewed that where there were two distinct conveyances, and not merely one conveyance with a declaration of trust, the heir on the part of the father would inherit. The custom of this manor required, where a tenant desired to make a devise, the execution of two distinct and separate deeds, and that being so, this case, there being no resulting trust, was covered by 12 B. and 13 A. in *Coke* upon *Litt.*; in short, from whatever point of view it was contemplated, it would appear clear that the descent had been broken; for even if the two deeds were considered as one, they would not give the testator back his estate, except by another surrender and admittance. Mr. *Hargrave*, in his note to 12 B., said: "If in the first feoffment the use had been expressly limited to the feoffor and his heirs, or if there was no declaration of uses, and the feoffment was not on such a consideration as to raise an use in the feoffee, and consequently the use resulted to the feoffor, in either case he is in of his ancient use and not by purchase." He also said that Lord *Coke* must be understood to speak of two distinct deeds, and here there were two, and it was clear that the first deed passed the whole estate. If it did not the second could have had no operation. If there had been a resulting trust upon the first deed, *Nanson* could not have declared the trusts which he did by the second deed, and which trusts were not identical with any resulting trust. The testator acquired a new equitable

(1) 12 B. (2) 13 A.

interest, and the case was analogous to a feoffment of an estate unto, and to the use of, the feoffee, and a second feoffment became necessary to bring back the estate to the original feoffor, and in such a case it had been long settled that the line of descent was broken: *Doe* v. *Morgan* (1).

Mr. *C. Hall,* and Mr. *Mounsey,* for the heir *ex parte maternâ.*

Mr. *Greene,* Q.C., and Mr. *T. Deere Salmon,* for the Plaintiff.

Mr. *Prendergast,* Q.C., Mr. *Finch,* and Mr. *Lindley,* for other parties, were not called upon.

SIR JOHN STUART, V.C.:—

My opinion is that the descent has not been broken. In order to break a descent, the owner of the estate must convey away all his interest in it, and he must, upon another transaction, and by another conveyance, take back the estate as a new estate, and so as to take it back as by purchase. The passage relied upon in *Coke* upon *Litt.* is one in which there is not that perfect perspicuity in the language necessary to convey fully what Lord *Coke* intended. Mr. *Hargrave,* in a note, has expressed more clearly what Lord *Coke* desired to state. In the text Lord *Coke* says:—[His Honour read the passage from 12 B. quoted above]; but it must be from the language plainly such a transaction as makes a new purchase, and consequently Mr. *Hargrave* says: "But here Lord *Coke* must be understood to speak of two distinct conveyances in fee; the first passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the land; and the second regranting the estate to him." In this case the lands are held according to the custom of the manor, and by the custom the only way in which a tenant can acquire the power of devising is by the machinery used in this case, so as to grant to a trustee absolutely, but upon trusts to be declared by another deed. So far from divesting himself of his whole estate and taking back a new one, it is perfectly clear that taking the two deeds together, as they must be taken, for

(1) 7 T. R. 103.

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it was one transaction, the operation of them was merely to give him a more complete dominion over it. By the first deed the trustee took the estate absolutely, but he had no beneficial ownership; and by the second deed the real owner obtained a larger dominion over the property, which consisted in a power to devise it, a dominion which he had not before. In my opinion the testator did not take back a new estate by purchase. These deeds were part of one transaction for a recognised purpose. The Chief Clerk has certified rightly in favour of the heir *ex parte maternâ*, and this motion on the summons to vary must be refused.

Solicitors: Messrs. *Sharp & Ullithorne*, agents for Mr. *Hough, Carlisle;* Messrs. *James, Curtis, & James*, agents for Mr. *Nanson, Carlisle;* Messrs. *Johnston & Mounsey*, agents for Mr. *Mounsey, Carlisle;* Mr. *Raw;* and Mr. *Waugh.*

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HOPE *v.* CARNEGIE. (1.)

Husband and Wife—Joint Appearance—Decree—Contempt by Wife by Breach of Injunction—Practice—Enforcing Orders—Substituted Service of Notice of Motion to commit—Separate Appearance.

2 R. M. 55

After a decree and injunction against husband and wife restraining proceedings abroad:—

Held, that a motion to commit the husband for his wife's breach of the injunction could not be sustained: that where a wife is living separate from her husband, and abroad, though she has appeared jointly with him by the same solicitor in all the proceedings in the cause, a notice of motion to commit for contempt must be served upon her personally, and that substituted service ought not to be ordered; and that either the Plaintiff or the husband may obtain an order for the wife's separate appearance; and therefore the Court refused the motion, with liberty to the Plaintiff and the husband to make such application as they respectively might be advised to obtain the separate appearance of the wife.

affd 4 Ch 264

ADRIAN JOHN HOPE, the testator in these causes, a domiciled Englishman, died seised and possessed of considerable real and personal estate both in this country and in *Holland*. The personal estate in *Holland* was in the custody of, and managed by, Messrs. *Stork & Van West*, of *Amsterdam*, as agents of the testator,

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and their agency was continued after his death. A suit of *Hope* v. *Beresford Hope* was instituted, and a decree made for the administration of the testator's estate. After the decree proceedings were taken in *Holland* by one of the daughters of the testator (*Emily Mathilde Hope*) for administration according to the Dutch law. This suit was then instituted, and an injunction obtained restraining those proceedings (1). Subsequently a decree was made in this suit, together with an order on further consideration in the first suit, declaring, among other things, that all the testator's residuary personal estate, whether in this country or in *Holland*, belonged to the Plaintiff. After this decree *Louisa Albertine Carnegie*, another daughter of the testator, who, together with her husband, Admiral *Carnegie*, was a Defendant to this suit, caused proceedings similar to those taken by *Emily Mathilde Hope* to be commenced in the name of her husband and herself in *Holland*, and served a notice, dated the 20th of April, 1868, also in the names and purporting to be on behalf, first, of the Defendant *L. A. Carnegie*, in the said notice called Lady *L. A. Hope*, assisted by the Defendant *S. T. Carnegie*, and secondly, of the Defendant *S. T. Carnegie*, upon Messrs. *Stork & Van West* not to part with the property; and thereupon an application was made on behalf of the Plaintiff for an injunction, and it was, on the 25th of June, 1868, after hearing counsel for the Defendants Admiral *Carnegie* and *Louisa Albertine* his wife, ordered that the said Defendants and their respective notaries, professional and other agents, be restrained until further order from commencing, continuing, or prosecuting any proceedings in the Kingdom of the *Netherlands*, or elsewhere, in respect of the moveable or personal estate late of the testator, and from intermeddling with the said estate, or any part thereof, whether within the Kingdom of the *Netherlands*, or elsewhere, and from obstructing by legal proceedings or otherwise, or in any manner intermeddling with the said estate, or with *Peter Rudolph Stork* or *Edward Van West*, or any other agent having the custody or management of any part of the said estate, in respect of the management or disposition of the said estate, and in particular that the said Defendants, *S. T. Carnegie* and *Louisa Albertine* his wife and their respective notaries, professional and other agents,

(1) Law Rep. 1 Ch. 320. 12 Jur NS 284

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be restrained from allowing the notice dated the 20th of April, 1868, to remain unrevoked, and from continuing, commencing, or prosecuting any proceedings in the Kingdom of the *Netherlands* or elsewhere, under or by virtue of the said notice, or in relation to the matters therein mentioned, and from serving, or directing or allowing to be served, upon *P. R. Stork & E. Van West*, or either of them, or any other person, any notice in relation to the matters aforesaid.

A notice of motion for the 28th of July, to commit Admiral *Carnegie* and his wife for breach of the injunction, was served on Admiral *Carnegie*, but personal service could not be effected on his wife.

On the 25th of July, 1868, upon a motion *ex parte* on behalf of the Plaintiff it was ordered that service of the order of the 25th of June, and of a notice of motion for the 28th of July for committal of the Defendants Admiral *Carnegie* and *L. A. Carnegie* his wife, upon the Defendant Admiral *Carnegie*, and upon *W. H. Rennolls*, the solicitor on the record for Admiral and Mrs. *Carnegie*, and upon *R. J. P. Broughton*, solicitor (who had instructed counsel to appear separately for Mrs. *Carnegie* on the motion made on the 25th of June, 1868), be deemed good service on the Defendant *L. A. Carnegie.* This substituted service had not been effected before the 28th of July, and on the 28th of July an order was made by which, after reciting the order of the 25th of July, and that a motion to commit had been that day moved, but that it was alleged by the Plaintiff's counsel that the orders of the 25th of June and the 25th of July had not been served as directed upon the Defendant *L. A. Carnegie*, it was ordered that the motion should stand over until the first day of Michaelmas Term, and that service of the order of the 25th of June, and of a notice of motion for the 2nd of November to commit the Defendants Admiral *Carnegie* and *L. A. Carnegie*, his wife, upon the Defendant Admiral *Carnegie*, and upon *W. H. Rennolls* and upon *R. J. P. Broughton* be deemed good service on the Defendant *L. A. Carnegie.* This order was served in the manner directed at the end of October, 1868, and the motion was brought on on the 19th of November.

The evidence shewed that Admiral *Carnegie* had given notice to his professional agents at *Amsterdam* that the notice of the 20th of

April had not his sanction, and that this had been communicated to Messrs. *Stork & Van West*, but Mrs. *Carnegie* had remained abroad and declined to concur in revoking the notice. There was some contest whether, by the Dutch law, it was possible for Admiral *Carnegie* to take any further steps to procure an effectual revocation of the notice by his wife, and whether, after the Admiral's counter notice, the first notice would operate as a *distringas* on the funds. Admiral *Carnegie* put in evidence a correspondence between himself and his wife, in which he had vainly striven to induce her to submit.

Mr. *Dickinson*, Q.C., and Mr. *Hemming*, for the motion:—

The case which the Court has to deal with is one of husband and wife appearing together by one firm of solicitors in a suit in which the Court has made a decree that the property which was in dispute belongs to the Plaintiff and does not belong to this husband or to his wife. In disregard of the Plaintiff's rights, the husband and his wife, or the wife in his name, have made a claim in the Courts in *Holland* to the Plaintiff's property in that country, and have given notice to the agents not to part with the property. This Court granted an injunction against the husband and his wife, and ordered them to discontinue their proceedings in *Holland* and revoke the notice. The matter was fully considered and adjudicated upon when the motion for the injunction was made, but since that time Mrs. *Carnegie* has done nothing in compliance with the order. The notice of the 20th of April continues in operation, so far as Mrs. *Carnegie* is concerned, and so far as the husband is concerned, excepting that he has given notice that it has not his sanction. It appears that the husband has written letters to his wife beseeching her to comply with the order, but they amount to nothing. He ought to have taken the necessary steps to annul the proceedings in *Holland*. Even if guilty of no personal default, the husband is answerable for his wife's contempt until he obtains an order that he may appear in future separately from his wife and be relieved from the consequences of her conduct. When he has done this, but not till then, the Plaintiff will be in a position to obtain an order for the wife to appear separately, and upon that to found proceedings in contempt against her alone.

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In the meantime the husband, however innocent, is liable to be committed for the wife's contempt. Nor is this any real hardship, because, on proving that he is not colluding with his wife, he can protect himself against the consequences of the contempt, and may obtain an order to appear separately from his wife. Until the husband does that, the Plaintiff cannot go against the wife separately, except in special cases, as if the husband be incapable through insanity, or be abroad for the purpose of defeating the process of the Court. This is the settled practice where the contempt of the wife consists in not answering, and the same principle must apply to every other contempt: *Barry* v. *Cane* (1); *Garey* v. *Whittingham* (2); *Nichols* v. *Ward* (3); *Anon.* (4). The only difference between a contempt for want of a wife's answer and contempt for breach of an injunction, seems to be that in the former case the husband, however innocent, is committed on an order of course, while in the latter case the order of committal is on motion upon proof of the wife's default: *Morgan's* Chancery Acts and Orders (5).

Mr. *Karslake*, Q.C., and Mr. *F. Waller*, for the Plaintiff:—

For the purposes of this motion we repudiate Mrs. *Carnegie* altogether, and do not appear for her.

[The Vice-Chancellor:—That I cannot allow. The motion is against the husband and his wife; they appear upon the record by the same solicitor, and up to this time have appeared together.]

This is an application to commit for the personal contempt of the wife, and the Court will not commit the husband for any tortious act which has been done by his wife living separate and apart from him, she having rebelled against him, and refused to do what was ordered by the Court. The complaint now is, that the wife procured a summons to be issued out of the Court at *Amsterdam*, for the purpose of preventing the estate in *Holland* being administered as ordered, and that notice of it having been served upon the agents of the executors operated as a *distringas*. The husband has given notice that he did not sanction the use of his name, and consequently has done everything that he could reasonably be expected to do to comply with the order. The motion is unnecessary and vexatious, and ought to be refused with costs, for the proper course to pursue, if the wife has been guilty of disobedience, was for the Plaintiff to apply for leave to serve her in *Paris*, and that being done, then if she did not obey the order of the Court, or appear here by her own counsel and solicitor, his next step would be to apply to sequester her estate. There is no precedent for an application by the husband that the wife shall change her solicitor, and shall, against her will, appear separately from him. A motion for this purpose is a step which the Plaintiff should take: *Jordan* v. *Jones* (1); *Graham* v. *Fitch* (2); *Home* v. *Patrick* (3); *Plomer* v. *Plomer* (4); *Bray* v. *Akers* (5); *Ottway* v. *Wing* (6); *Emery* v. *Wase* (7); *Roper* on Husband and Wife, by *Jacob* (8); *Macqueen's* Husband and Wife (9); *Morgan's* Chancery Acts and Orders (10).

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(1) 3 Madd. 472.

(2) 1 S. & S. 163.

(3) 2 Mac. & G. 140.

(4) 2 Ves. 332.

(5) 4th Ed. p. 435.

Mr. *Dickinson*, in reply, contended that the husband ought to take certain steps in *Holland* for annulling the notice, which had been pointed out, or if he desired to sever from his wife in the suit, then he should move for that purpose and the Plaintiff would not oppose; but if he determined not to do so, then, for the purpose of getting at his wife, it was necessary that the Plaintiff should go against the husband and obtain an order for his committal, which, without doubt, ought to be granted.

SIR JOHN STUART, V.C.:—

This is a motion to commit both Admiral *Carnegie* and his wife to prison as being guilty of contempt of Court. This Court acts only *in personam*, and unless its orders can be enforced by compulsory process the proceedings of the Court would become nugatory. In the present case, the contempt alleged is a breach of a mandatory injunction to restrain the Defendants, *S. T. Carnegie* and *L. A. Carnegie* his wife, from allowing a certain notice, which was

(1) 2 Ph. 170.
(2) 2 De G. & Sm. 246.
(3) 30 Beav. 405. 8 Jur. NS 351.
(4) 1 Ch. R. 68.
(5) 15 Sim. 610.
(6) 12 Sim. 90.
(7) Sug. V. & P. 11th Ed. p. 231, and 8 Ves. 505.
(8) 2nd Ed. vol. i. p. 545.
(9) Page 33.
(10) 4th Ed. p. 435.

part of certain proceedings in a foreign Court, to remain unrevoked. The notice, it is said, remains unrevoked under circumstances which shew a wilful defiance and neglect of the order of this Court on the part of both husband and wife. The evidence shews that the Defendant *S. T. Carnegie* is in no wise implicated otherwise than in being charged with not having done all that he could do, and ought to do, in order to prevent his wife's proceedings. There is no reason whatever for saying that the husband has been guilty of any wilful contempt of this Court. Therefore as to him it seems to me that the motion for committal for contempt entirely fails.

As to the wife, she is living abroad and separate from her husband. An order was made *ex parte*, on the 25th of July, and another on the 28th of July, 1868, for substituted service upon her. Those orders were obviously made *per incuriam*, and have two defects. In the first place, they were orders for substituted service upon a married woman who appears jointly with her husband, and who has no other solicitor in this Court than her husband's, and who must be treated as joined with him in all these proceedings. That alone shews that the Court allowing the substituted service upon an *ex parte* application proceeded *per incuriam*, and had not before it that which should have prevented such an order, under such circumstances and in such a state of things, from being made. The other defect is, that the orders were for substituted service of a notice of motion to commit for a contempt, and this Court, jealous of the personal freedom of the subjects of the Crown, has never, upon any occasion in my experience, entertained a motion to commit for contempt unless on evidence of personal service on the person against whom the motion is made. The orders in this case, therefore, must be discharged. One peculiarity of this case is, that the husband and wife have been hitherto associated, and now appear by the same solicitor. The great embarrassment which occurs arises from the fact that neither the Plaintiff, nor Admiral *Carnegie*, nor Mrs. *Carnegie*, has obtained any order that the husband and wife should sever in their appearance in this cause. If an order had been obtained for Mrs. *Carnegie* to appear separately in all the proceedings, the embarrassment which is now felt as to enforcing the process of the Court could not have occurred. Admiral *Carnegie* and the Plaintiff have each attempted to shew that an order for the separate appearance of the wife could only be obtained by the other of them. These arguments seem to me to have proceeded entirely upon a misconception of the authorities. Husband and wife, being joined by law as one person, as to property and interest, for the most part appear jointly. But wherever the separate property of the wife is concerned, or the separate acts of the wife are disavowed by the husband, this Court has never wanted the means of enforcing against the wife, as easily as against the husband, its orders and decrees. Lord *Cottenham* in the case of *Jordan* v. *Jones* (1), said:—"It is quite new to me that the Court has no jurisdiction to compel a conveyance by a married woman pursuant to its decree." In other words, he meant that the Court would enforce its decree against a married woman. But why did not Lord *Cottenham* enforce the decree of the Court in that case? He was asked to compel the execution of a deed by a married woman, which the law had said should only be executed by her voluntarily. How can this Court compel a married woman to execute a deed where the law says it shall be done voluntarily? The Court cannot compel the husband, or the wife, to obtain an order for her separate appearance. But if the Plaintiff in the prosecution of his rights, and in order that he may enforce the decree, shews to the Court that by reason of neither the husband nor the wife obtaining an order for her separate appearance a decree or order of this Court would remain a dead letter, in such a case the order for separate appearance may be obtained by the Plaintiff. In the present case, the evidence shews an actual disobedience of the order of the Court by the wife, as separate from her husband, and not countenanced by her husband, but disavowed by him, and the purposes of justice would be baffled, and the Plaintiff would be deprived of his remedy entirely, unless it were open to him to obtain this order. The authorities justify that view. In *Nichols* v. *Ward* (2), which was before Vice-Chancellor *Wigram* and Lord *Cottenham*, the act of disobedience, for which an attempt was made to visit the husband, was clearly not his act, but that of his wife; and on an application for quite a different order the Vice-Chancellor *Wigram* ordered that the husband should be no longer liable

(1) 2 Ph. 172. (2) 2 Mac. & G. 140.

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for the contempt of his wife. The Plaintiff being still baffled, and the contempt of the wife in not answering still preventing and obstructing the course of justice, the Vice-Chancellor *Wigram* gave leave to serve a notice of motion on the wife in the *Isle of Man*, out of the jurisdiction of the Court, to answer separately from her husband. In this case all the difficulty has occurred from neither the Plaintiff nor the Defendants applying for an order that the Defendants should be dissociated in their defence to this suit. I think Admiral *Carnegie* has been guilty of no wilful disobedience of this Court, but that apparently Mrs. *Carnegie* has. Till she appears separately, and the matter has been put into such a position that the Court can act against her separately, the Court can do nothing to assist the Plaintiff. In order that the Court may assist the Plaintiff he must first assist himself, and take such a course as is necessary for the purpose. The only order that can be made at the present time is to discharge the orders for substituted service, and to give liberty to the Plaintiff and to the Defendants, *S. T. Carnegie* and his wife, or any or either of them, to make such application as may be advised, to obtain the appearance of Mrs. *Carnegie* in the proceedings in this Court separately from her husband, and the parties must bear their own costs of this application.

Solicitors: Messrs. *Young & Jackson*; Mr. *W. H. Rennolls.*

HOPE *v.* CARNEGIE. (2.)

V.-C. S.
1869
Feb. 25.

Husband and Wife—Contempt by Wife by Breach of Injunction—Practice—Enforcing Orders—Separate Appearance.

After a decree against a husband and wife, who were living separate, she living abroad and disobeying an order of the Court:—

Held, that the husband was entitled on motion to an order that she should appear separately in all further proceedings in the suit, and that he should not be responsible for any neglect on her part in relation to such proceedings, nor liable to any attachment or process in consequence of such neglect; and that it was not necessary to serve notice of the motion upon his wife, service of notice of such a motion on the Plaintiff being sufficient; and leave was given to the Plaintiff to serve the order and any other proceedings on the wife abroad.

THIS was a motion on behalf of the Defendant *Swynfen Thomas Carnegie*, that the Defendant *Louisa Albertine Carnegie*, his wife, might be ordered to appear separately from the said *S. T. Carnegie* in all further proceedings in this suit; and that he the said *S. T. Carnegie* might not be in any manner responsible for any neglect or refusal by or on the part of the said *L. A. Carnegie*, his wife, in relation to such proceedings, or any of them, nor liable to any attachment or process in consequence of such neglect or refusal. The circumstances which gave rise to this motion are fully stated in the report of *Hope* v. *Carnegie* (1), the short facts being, that after decree in a suit in which Admiral *Carnegie* and his wife had appeared together as Defendants, and after an injunction against them, the wife committed a breach of the injunction abroad, which the husband alleged he had endeavoured without success to prevent. There was evidence that the wife was living abroad, and that there was no collusion between Admiral *Carnegie* and his wife.

Mr. *Karslake*, Q.C., and Mr. *F. Waller*, for the motion, contended that, under the circumstances in this case, this was the proper course to take, and that the next step would be to obtain leave to serve the wife abroad. If afterwards she disobeyed the order for an injunction, the Court would make an order for committal, but that order could not be made immediately. Though it might not be strictly necessary that the order on this motion should be served upon the wife, yet the husband's solicitor proposed to ask leave to do that. The case of *Nichols* v. *Ward* (1) was one of answer, which made all the difference, and the cases of *Barry* v. *Cane* (2), *Garey* v. *Whittingham* (3), and *Bushell* v. *Bushell* (4), which had reference to this case, could be used only for analogy, and not as precedents.

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(1) *Ante*, p. 254.

[The Vice-Chancellor:—It is plain that the husband, whether he knew that his wife was at home or abroad, before appearing, might have applied for an order to appear separately. They did, however, appear jointly.]

The husband and wife having appeared jointly, and a decree been made in proper form, the question was, what was the right course for the husband to take to relieve himself of consequences under which his wife was treated as part of himself, and it was submitted that the wife ought to be ordered to appear separately.

Mr. *Dickinson*, Q.C., and Mr. *Hemming*, for the Plaintiff, did not object to the order asked, but contended that to make it effectual notice ought to have been given to the wife of this motion. If any difficulty arose in consequence of the necessity of serving her abroad, it ought to be thrown upon the husband, who was coming here to be relieved from the consequences of his wife's conduct: *Bunyan* v. *Mortimer* (5), *Garey* v. *Whittingham*, *Graham* v. *Fitch* (6), and *Home* v. *Patrick* (7), shewed that that was the proper practice. The husband cannot get relieved himself, except by a proceeding which will entitle the Plaintiff to proceed personally against the wife; and for this purpose notice should be given to her. An order made without notice would leave the husband quite irresponsible, and it might not give the Plaintiff the advantage of proceeding against the wife as a *feme*

(1) 2 Mac. & G. 140.

(2) 3 Madd. 472.

(3) 1 S. & S. 163.

(4) Ibid. 164. In reply to an inquiry by the Vice-Chancellor, it was stated by Mr. *Milne*, the Registrar, that the order in this case had not been entered.

(5) 6 Madd. 278.

(6) 2 De G. & Sm. 246.

(7) 30 Beav. 405. 8 Jur N.S. 351

sole. As the husband's advisers said they were willing to take the responsibility of serving an order upon the wife, they might even, if only as a matter of convenience, and to remove any chance of irregularity in the proceedings, serve her with notice in the first instance. In *Bushell* v. *Bushell* (1) the order made was against the opinion of the Vice-Chancellor of *England*, for he said he doubted whether there ought not to be notice. The order was not entered, and was apparently made to lay the foundation for an argument on motion to discharge it.

Home v. *Patrick* (2) was a distinct decision that notice was necessary, and *Bunyan* v. *Mortimer* (3) an express authority that notice must be given to a wife of such a motion against her. The authorities being in this state, the Plaintiff ought not to be put in the position of being liable to have the order disputed hereafter (4).

Mr. *Karslake*, in reply.

SIR JOHN STUART, V.C.:—

None of the cases cited are authorities exactly applicable to the present. This application is made after decree. The decree has been obtained regularly so as to bind both husband and wife. In *Home* v. *Patrick* the question was as to the right to an attachment against a married woman who had been ordered to answer separately. The Master of the Rolls held that if she had concurred in the order to answer separately, no notice of motion for the attachment need be served upon her. Here she was a party to the decree, and is bound by it; although not otherwise than in the ordinary case of a decree against husband and wife.

What is sought by this motion is not sought for the benefit of the Plaintiff or to enable the Plaintiff or the Defendant—the

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(1) 1 S. & S. 164.

(2) 30 Beav. 405. 8 Jur N.S. 251.

(3) 6 Madd. 278.

(4) In the course of the argument, in reply to a question sent by the Vice-Chancellor, "When an order is made that a married woman shall answer separately, and she is in contempt for want of answer, does not an attachment issue against her as a matter of course just as much as against the husband on affidavit of service on her of the order to answer separately?" Mr. *Seth Ward*, one of the Clerks of Records and Writs, certified that an attachment in such a case as the above is never issued without an express order, and that the order always states the time within which she must answer.

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(2.)

husband—to obtain a decree. The Court having pronounced its decree this Defendant merely asks that he may be freed from liability for his wife's conduct, she refusing to obey the order of the Court. There is no disobedience or misconduct on his part. The evidence shews that he is living separate from his wife and has no control over her. It seems to me therefore, considering the nature of the application, that it is not necessary that he should serve notice of this motion upon his wife.

In the case of *Garey* v. *Whittingham* (1), the order for the relief of the husband appears to have been made without service of any notice of motion on the wife. All that the husband asks is that his wife may be ordered to appear separately in all further proceedings in the cause, so that he may not be responsible for her conduct; and, in my opinion, he has made out his right to an order. An order in these terms will not in the least degree expose the wife to anything which she ought not to be legitimately exposed to. I shall give the Plaintiff leave to serve this order, and any notice of motion, and an office copy of any document which has been used in the proceedings in the cause, upon this lady abroad, as he may be advised. There will be no order as to costs.

Solicitors: Mr. *W. H. Rennolls;* Messrs. *Young & Jackson.*

(1) 1 S. & S. 163.

FENTON *v.* QUEEN'S FERRY WIRE ROPE COMPANY.

V.-C. M.
1868
Nov. 25.

Assignment under Bankruptcy Act, 1861, s. 197—*Right of Trustee to sue—Authority to file Bill—Solicitor—Costs.*

The trustee of a creditors' deed in the form given in Schedule D. to the *Bankruptcy Act*, 1861, can sue in his own name to enforce a contract with the debtor, and if the debtor is joined as co-Plaintiff in such a suit, he is entitled to have his name struck out, with costs against the solicitor, though he may have given a general authority to take all steps necessary to enforce the contract.

THIS was a motion by one of the Plaintiffs in the suit to have his name struck out of the record, on the ground that the solicitor had inserted it without authority, and that the solicitor should pay the costs of the motion.

The bill was filed by Mr. *Blease*, the trustee under a creditors' deed of the insolvent firm of *Fenton, Holden, & Edwards*, against the Defendant company for specific performance of a contract entered into by the firm before their insolvency.

Messrs. *Fenton, Holden, & Edwards*, after entering into the contract in question, made an assignment to the Plaintiff *Blease* for the benefit of their creditors in the form given in Schedule D. of the *Bankruptcy Act*, 1861, and Mr. *Blease's* solicitor had made the three members of the insolvent firm co-Plaintiffs with Mr. *Blease* in the suit to enforce specific performance of the contract. Mr. *Holden*, one of the co-Plaintiffs, objected to his name being used as a Plaintiff, on the grounds, first, that he had never authorized it; and, secondly, that he was an unnecessary party, inasmuch as all his interest in the contract had passed to *Blease* by the assignment, and that *Blease* was competent to maintain the suit in his own name without making the late firm parties.

It appeared that the debtors had authorized all steps that might be necessary to enforce the contract.

Mr. *Glasse*, Q.C., and Mr. *Mounsey*, in support of the motion:—

No authority was given by Mr. *Holden* which could have justified his name being joined as a Plaintiff in this suit, and upon

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the authority of *Wright* v. *Castle* (1), *Allen* v. *Bone* (2), and *Wilson* v. *Wilson* (3), he is entitled to have his name removed from the record, and to have his costs paid by the solicitor.

By the 197th section of the *Bankruptcy Act*, 1861, it is provided that the debtor and creditors, and trustees, of any deed of assignment under the Act, shall be in the same position, and have the same powers, rights, and remedies, as if the debtor had been adjudged a bankrupt, and the trustees had been appointed assignees under the bankruptcy. If this had been a bankruptcy, the assignees would have been the only necessary parties to a suit for specific performance, and consequently the trustee under this deed of assignment has full power to sue, and the debtors are unnecessary parties.

Mr. *Freeling*, for the solicitor and the other Plaintiffs:—

The solicitor acting on behalf of Mr. *Blease* had authority from Mr. *Holden* to take such steps as might be necessary to enforce specific performance of the contract, and this implied an authority to file a bill against the Defendant company. It is submitted that these debtors were proper parties to be joined with the trustee as Plaintiffs in a suit for specific performance, and on either ground the motion is misconceived.

Mr. *Jackson*, for the Defendants.

Sir R. Malins, V.C.:—

I am satisfied upon the evidence that Mr. *Holden* intended all proceedings should be taken which were necessary for the purpose of enforcing the contract, and I should therefore have held that there was sufficient authority to the solicitor to do all that was required in this suit, and that there was an implied, if not an express, authority to institute the suit; and if it had been necessary that the assignor's name should be used, then the solicitor would have had authority to join his name in the suit; but I am clearly satisfied that, under the Act of 1861, all the property was vested in the trustee in the same way as if the assignor had become a bankrupt.

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(1) 3 Mer. 12.
(2) 4 Beav. 493.
(3) 1 Jac. & W. 457.

In Bankruptcy the assignees can sue in their own names for anything belonging to the bankrupt; but it is said that as this is the case of a trust deed executed in the form of Schedule D. to the *Bankruptcy Act*, and inasmuch as there might be a surplus, after all the debts are paid, coming to the bankrupt, he was therefore a necessary party to the suit. But the 197th section of the *Bankruptcy Act* assimilates the case of an assignment in all respects to a bankruptcy, and I think that Mr. *Blease*, the trustee of the insolvent firm, was quite competent to enforce the contract in his own name. The consequence is, that Messrs. *Fenton*, *Holden*, *& Edwards*, were unnecessary parties to the suit, and that, although Mr. *Holden* intended to authorize all necessary things to be done, the use of his name in this suit not being necessary, the solicitor had no right to use it in this suit without express authority.

No one can be made a party to a Chancery suit without an express or implied authority, and there was neither express nor implied authority in this case.

The result is that Mr. *Holden's* name was improperly placed on the record; and the important question is, who is to pay the costs of this motion? As I have come to the conclusion that Mr. *Holden* is entitled to succeed on the motion, I am bound to say that, as a price of success, he must have his costs.

Solicitors for the Plaintiffs: Messrs. *Bower & Cotton.*

Solicitors for the Defendants: Messrs. *Doyle & Edwards.*

V.-C. M.
1868
Nov. 24.

MATHIESON *v.* HARROD.

Copyright—Registry—Date of Publication—5 & 6 *Vict.* c. 45.

In registering a copyright in the registry book of the *Stationers' Company* in pursuance of the Act 5 & 6 Vict. c. 45, it is not sufficient to enter the month in which the first publication takes place; but the day of first publication must be stated.

9 Eq 328
14 Eq 411,
15 Eq 108
18 Eq 446
7 Ch D. 306

THIS bill was filed by the Plaintiffs, as the registered proprietors of the copyright in a book entitled "*Mathieson's Brighton and Suburban Directory*," for an injunction to restrain the Defendant from publishing, selling, or disposing of a book entitled the "*Postal and Commercial Directory of Sussex*," containing any parts of the Plaintiff's book.

The cause now came on for hearing, and a preliminary objection was raised that the Plaintiff's book had not been properly entered in the book of registry of the *Stationers' Company*, in pursuance of the Act 5 & 6 Vict. c. 45.

It appeared from the evidence that the Plaintiffs had not entered upon the registry the day upon which the book was published, but only the month in which it was published, that is to say, the month of December, 1866.

Mr. *Glasse*, Q.C., and Mr. *Langworthy*, for the Plaintiffs:—

It is not necessary under the *Copyright Act* (5 & 6 Vict. c. 45) for the publisher of a book, in order to entitle him to sue upon his copyright, to do more than enter the time of first publication, and this is sufficiently indicated by entering the month. The 13th section of the Act specifies that the "time" shall be entered, and by the form given in the schedule to the Act the "date" is required to be entered. This variation shews that the exact day of the month is not of importance. All that the public require to be informed of is the time of the expiration of the copyright, and if the month only is entered, then the monopoly given by the Act would expire at the commencement of the month, since the publisher had failed to protect himself further by an omission of the precise day. In the case of *Low* v. *Routledge* (1) the objection that a false date was entered was held sufficient to make the registry invalid, but this is not a false entry, since the book was actually published during the month of December. In *Wood* v. *Boosey* (1) it was held to be an insufficient registry because the publisher had only entered the year of publication, and this was, of course, too wide a statement.

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(1) 33 L. J. (Ch.) 717; S. C. Law Rep. 1 Ch. 42; 3 H. L. 100.

10 Jur N.S 922; 11 Jur N.S 939

Mr. *Shapter*, Q.C., and Mr. *Fischer*, for the Defendant, mentioned the case of *Sayer* v. *Dicey* (2), but were not called upon to address the Court.

SIR R. MALINS, V.C. :—

As the Defendant in this case raises a question independent of merits, it may be surmised that he has no merits to rest upon. I assume, however, that both parties may have a perfectly good case; but the Legislature in conferring a copyright by Act of Parliament has done so subject to certain conditions, by compliance with which alone is a publisher entitled to that right. I should be very sorry if my decision were to have the effect of preventing the Plaintiffs from supporting their copyright if they are entitled to it; but I find that that will not be the case, since the Plaintiffs may re-register their copyright.

It is, therefore, a mere question whether the present suit can be maintained. By the 13th section of the Act it is provided, that the proprietor of a copyright may make an entry in the registry book of the *Stationers' Company* of the title of the book, the time of first publication, and the name and place of abode of the publisher thereof; and by the 24th section it is declared that no proprietor of a copyright in any book shall be entitled to maintain an action or suit in respect of an infringement of such copyright unless he shall have caused an entry to be made in the registry book of the *Stationers' Company* of such book pursuant to the Act. Then in the schedule a form of entry is given, in one column of which the "date" of first publication is required to be entered. No doubt there is a variance in the expression used, but they both mean the same thing; and upon this question the case of *Sayer* v. *Dicey* is an authority.

(1) Law Rep. 2 Q. B. 340.

(2) 3 Wils. 60.

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The real object of the entry of the date is, that the public may know when the copyright commenced, and when it, therefore, would end; and the omission of the date deprives the Plaintiff of his right to sue under the Act. I should have come to this conclusion if there had been no decision on the subject—that the registry of the month of publication was too loose an expression; for if I held that the entry of the month was sufficient, the same argument might be used with respect to the year of publication. It is quite clear that would not do, and by permitting any deviation from the terms of the Act you introduce the greatest laxity. Besides, there is no more difficulty in a man stating the day than the month, and it is obvious that the omission was a mere act of neglect. My opinion is, that the Plaintiffs have not complied with the requirement of the Act of Parliament.

But the question is concluded by authority, for in the case of *Low* v. *Routledge* (1), where a wrong date was given, there was, at any rate, a statement of the right month; but still Vice-Chancellor *Kindersley* decided that a variation in the date was bad, and as far as that case applies to this I am bound to consider it as a decision adverse to the present contention.

In *Wood* v. *Boosey* (2) Mr. Justice *Blackburn* said, that in order to comply with the Act it was not sufficient to state the year, and if the year is not sufficient, the month is not enough. I feel bound, therefore, to decide that where it is required that the date should be stated the provisions of the Act are not satisfied without an entry of the day, month, and year.

The express terms of the 24th section of the Act are so clear that I have no alternative but to dismiss the bill with costs.

Solicitor for the Plaintiffs: Mr. *W. Elam.*

Solicitor for the Defendant: Mr. *George Biller.*

10 Jur NS 922. 11 Jur NS 939

(1) 33 L. J. (Ch.) 717; S. C. Law Rep. 1 Ch. 42; 3 H. L. 100.

(2) Law Rep. 2 Q. B. 340.

In re ORIENTAL COMMERCIAL BANK.

ALABASTER'S CASE.

V.-C. G.
1868
Nov. 23, 24.

Company—Agreement to amalgamate—Terms of Exchange of Shares—Application by Shareholder—Liability of Shareholder—Contributory.

4 Ch 687,
—690
6 Ch 268,
8 Ch 257,
—540,—

In March, 1865, an agreement was come to between the respective directors of two companies, *C.* and *B.*, to amalgamate, upon terms that each shareholder of company *C.* was to take a certain proportionate number of shares of company *B.* at a fixed nominal value, with other provisions; and by resolutions passed at an extraordinary general meeting of the *C.* shareholders in April, 1865, it was resolved that the agreement should be carried out, and that company *C.* should be wound up voluntarily. On the 17th of May a deed was executed carrying out this agreement.

In June, 1865, *A.*, a shareholder of company *C.*, received from the liquidators a circular letter requesting him to send his share certificates to them, to be exchanged for certificates of shares in company *B.*, and enclosing for him to fill up a printed letter addressed to the liquidators, requesting them to obtain for him certificates of *B.* shares in exchange for his. This form *A.* filled up, signed, and returned, with his share certificates enclosed, to the liquidators. He afterwards received a form of notice of an intended shareholders' meeting of company *B.*, which he did not attend. He never received any letter of allotment of *B.* shares, and though the directors of company *B.* declared a dividend, he never received a dividend warrant.

In July, 1866, company *B.* was ordered to be wound up; and shortly after *A.* was informed that his name had been settled on the list of contributories, and then for the first time learned that his name had been, on the 9th of September, 1865, placed on the share register. He also found that a form of certificate of shares had been issued by company *B.* in exchange for those received from company *C.*, which bore on its face these words, "For account of the" (*C.* company) "in liquidation, subject to covenants of May 17, 1865." These certificates were forwarded by the *B.* directors to the liquidators of company *C.*, who retained them, so that *A.*'s certificate of shares in company *B.* never reached him personally.

In February, 1868, by a decree of the Court, in a suit instituted on the 10th of November, 1865, it was declared that the arrangement of March, 1865, was beyond the powers of the directors of company *C.*, and was not binding on any of the shareholders of company *C.*:—

Held, that *A.*, though his application was not commenced till January, 1867, was entitled to have his name removed from the list of contributories of company *B.*

THIS was a summons, adjourned from Chambers, on behalf of *Robert George Alabaster*, seeking to have his name removed from

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the list of contributories of the *Oriental Commercial Bank, Limited,* in respect of thirty-three £20 shares in the company.

In March, 1865, Mr. *Alabaster* was the holder of 100 shares of £20 each, in the *Financial Corporation, Limited,* which was a company registered on the 29th of December, 1863, with a capital of £3,000,000, at first in 30,000 shares of £100 each, and afterwards in 150,000 shares of £20 each. Of these, 75,000 had been issued, on which £2 had been paid.

In the course of March, 1865, a scheme was on foot for amalgamating the *Financial Corporation* with the *Oriental Commercial Bank.* This was a company which had been registered on the 30th of December, 1864, also with a capital of £3,000,000, in 150,000 shares of £20 each, of which 75,000 had been issued, on which £5 had been paid.

On the 24th of March, 1865, a preliminary agreement was signed by the directors of the corporation and of the bank containing the heads of the proposed amalgamation. By this it was provided that for every three shares in the corporation one share in the bank should be exchanged, so that 75,000 of the corporation £2 shares should be replaced by 25,000 bank £5 shares; the 25,000 bank shares to be credited as £4 paid up, instead of £5, for the purposes of calls; and the funds of the corporation, when realized, to be paid into the accounts of the bank for every one of the 25,000 shares, to the amount of £6 per share, to be credited only as £5. There were several other minor provisions.

On the 27th of March notices were issued by the corporation directors of a meeting to be held on the 12th of April, at which resolutions were to be passed for carrying into effect the proposed amalgamation; and on that day the meeting was held, and the resolutions were passed, amongst which was one that the corporation should be wound up voluntarily. These resolutions were confirmed at another meeting held on the 9th of May.

On the 17th of May a deed was executed, expressed to be made between the bank of the first part, the corporation of the second part, and the liquidators of the third part, and which purported to carry into effect the proposals for amalgamation contained in the agreement of the 24th of March.

On the 6th or 7th of June following, *Alabaster* received from the secretary of the corporation a circular letter in the following terms, similar letters having been issued to all the corporation shareholders.

"*London*, E.C., 6th June, 1865.

"The *Financial Corporation, Limited*,
"14, *Leadenhall Street.*

"Sir,—I am instructed by the liquidators to request that you will at your earliest convenience transmit to this office your present share certificates in order that a proper requisition may be made, and the certificates for exchange in the *Oriental Commercial Bank* may be accordingly prepared. Annexed is the form requiring your address, date, and signature, to accompany your returned signature.

"I am, Sir, your obedient servant, *John Biggam*, Secretary."

Enclosed in the circular, and printed on the fly-leaf, was a document in the following form:—

". . . . 1865.

"To the Liquidators of the *Financial Corporation, Limited, Leadenhall Street, London*, E.C.

"Gentlemen,

"I beg herewith to enclose you my certificates, Nos. , representing shares in your company, in exchange for which I beg that you will obtain certificates for the corresponding number of shares in the *Oriental Commercial Bank, Limited*, or say one share of the latter for every three of your company.

"I am, gentlemen, your obedient servant,

. . . ."

Mr. *Alabaster* filled up this form, signed and returned it, with his share certificates enclosed, to the liquidators of the corporation.

In February, 1866, a report and balance sheet were presented by the directors of the bank to their shareholders at the ordinary general meeting, held on the 22nd of February, 1866. They were to this effect: "The directors have much pleasure in reporting that the profits of the bank for the six months ending the 31st of December last, after payment of all charges," and so on, "amount to" so much (specifying the amount) "equal to 23 per cent. per annum on the amount of paid-up capital ranking for dividend. The directors now declare an interim dividend for the past six months, at the rate of £10 per cent. per annum, clear of income tax which will absorb £8500, leaving a balance of £11,127 13*s.* 2*d.*," and so on. It ended thus: "The directors would remind the shareholders that this result has been obtained without the assistance of the additional capital of £125,000, shortly falling due from the *Financial Corporation.* This sum, when received and employed in extending the business of the bank, must tend still further to consolidate and strengthen its position, as well as augment its future profits." Then followed the balance sheet, which shewed items corresponding with those stated in the agreement and deed of amalgamation.

Notice of this meeting was sent to Mr. *Alabaster,* but he did not attend it.

On the 4th of August, 1866, an order was made for continuing under supervision the voluntary winding-up of the bank, which had been resolved upon on the 12th of July previous. At this date only 39,255 out of 75,000 shares in the corporation had been registered for exchange by their holders (230) for shares in the bank.

Shortly afterwards Mr. *Alabaster's* name was placed on the list of contributories for the thirty-three shares. He then for the first time discovered that his name had been, on the 9th of September, 1865, placed on the share register of the bank. No letter of allotment was sent to him by the bank; and though the bank had declared a dividend, they never sent him a dividend warrant or other notification.

It then appeared that the dividend had been credited in account with the liquidators upon the whole of the 25,000 shares, although only a portion had then been taken in exchange.

It also appeared that at intervals from July, 1865, to March, 1866, the *Financial Corporation* certificates, after having been received from the shareholders by the liquidators, were forwarded by them to the directors of the bank, and in return for them bank share certificates were sent by the directors of the bank to the liquidators of the corporation, who deposited them for safety with their bankers.

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These bank share certificates were in the following form:—

"Distinctive No. 779.
"Register No. 775.

"For account of the *Financial Corporation, Limited,* in liquidation, subject to covenants of May 17, 1865.

"Capital £3,000,000.

"The *Oriental Commercial Bank, Limited.*
"150,000 shares of £20 each.

Oriental
Commercial
Bank, Limited.
Registered
30 Dec. 1864.

"This is to certify that *Robert George Alabaster,* of *Finsbury Market,* is the proprietor of thirty-three shares of £20 each, numbered from 52,725 to 52,757, both inclusive, in the *Oriental Commercial Bank, Limited,* subject to the rules and regulations of the company, and that up to this day there has been paid in respect of each of such shares the sum of £4.

"Given under the common seal of the said company, the 18th day of July, 1865.

"*Demetrio Pappa,*
Manager."

"*Aug. M. Kingley,*
Hy. Spicer, } Directors."

In January, 1867, *Alabaster* first applied to have his name removed from the list of contributories.

By a decree made on the 28th of February, 1868, by Vice-Chancellor *Wood,* in a cause of *Clinch* v. *Financial Corporation* (1), instituted on the 10th of November, 1865, by a shareholder on behalf of himself and all the other shareholders in the corporation (except the Defendants), it was declared "that the arrangement in the bill mentioned, come to between the directors of the *Financial Corporation, Limited,* and the directors of the *Oriental Commercial Bank, Limited,* for an amalgamation of the two companies on the terms in the said bill mentioned, was beyond the powers of the directors of the said *Financial Corporation, Limited,* and was not authorized

(1) Law Rep. 5 Eq. 450.

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by the articles of association thereof, and that such arrangement is not binding on the Plaintiff nor on any of the members of or shareholders in the said *Financial Corporation, Limited;*" and it was further declared " that the resolutions of the 12th of April, 1865, in the said bill mentioned, were not within the powers of a general or any other meeting of the said *Financial Corporation, Limited,* and were not authorized by the memorandum or articles of association of the said corporation, nor by the *Companies Act,* 1862, and that the same are not binding on the Plaintiffs or any other dissentient member of the said *Financial Corporation.*"

This decree was, on the 6th of November, 1868, affirmed on appeal by the Lord Chancellor and Lords Justices (1), certain consequential directions (not material to be stated) being varied.

Mr. *Mellish,* Q.C., Mr. *Kay,* Q.C., and Mr. *T. C. Renshaw,* for *Alabaster* :—

The question is, what is the position of Mr. *Alabaster* as one of the *Financial Corporation* shareholders who assented to the amalgamation; it having been declared by a decree of the Court that the arrangement for amalgamation is not binding on any of the corporation shareholders. It is not pretended that he ever entered into any separate negotiation or contract with the bank; that he ever applied for shares, or that any letter of allotment of shares was ever sent to him. He never dealt with any one but the directors of his own company.

The contention on the other side, no doubt, will be, that though not a contributory by virtue of any agreement between himself and the directors or shareholders of the bank, yet the bank having been ordered to be wound up before he made an application to be taken off the register, he must now be retained on the list.

But, first, no question of *laches* from non-inquiry, such as is described by Lord *Cranworth* in *Downes* v. *Ship* (2), can arise here. *Alabaster* was entitled to assume that what was proposed to be done could be carried out.

Further, it cannot be said that he ever assented to the winding-up, except upon the terms of the deed being carried out. He sent in his certificates, with a request to be supplied with bank share certificates, in a form which was not in language of his own. It is impossible to extract an assent out of that, or if an assent, only on the terms of the deed being carried out, one of these terms being, as the Lord Chancellor and the Lords Justices have held, that the whole of the 75,000 corporation shares should be sent in to be exchanged. How, then, can he be held liable to be a contributory?

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(1) Law Rep. 4 Ch. 117.

(2) Law Rep. 3 H. L. 343, 356.

[Reference was made to *Downes* v. *Ship* (1), and *Spackman* v. *Evans* (2).]

It was only as part of the arrangement, and in no other sense, that he agreed to take the shares. Holding out, to be good for anything against a shareholder, must be a holding of himself out. The fact that others have held him out, will not bind him. The form of the bank certificate itself shews that the exchanged shares were to be held by the holder "for account of the *Financial Corporation, Limited,* in liquidation, subject to covenants of May 17, 1865."

[*Pellatt's Case* (3) was also referred to.]

Sir *Roundell Palmer*, Q.C., Mr. *Druce*, Q.C., and Mr. *Macnaghten* for the liquidators of the bank:—

We rely on the principles laid down in *Lawrence's Case* and *Kincaid's Case* (4), as shewing that delay will deprive a shareholder of his right to set aside a voidable contract.

In this instance it is clear that Mr. *Alabaster* meant to have his name registered.

The reason why Mr. *Pellatt's* name was taken off the list of contributories of the *Richmond Company* was, that he took his shares subject to a condition which the company never fulfilled (5). *Elkington's Case* (6), on the other hand, more closely resembles this.

It has been said, that all Mr. *Alabaster* knew was, that his directors were carrying out an agreement, and that he was entitled to assume that it was *intrà vires.* But, from the evidence, it appears that he had actual notice of all that was going on. It is too late for him now to attempt to repudiate.

(1) Law Rep. 3 H. L. 343.
(2) Ibid. 171.
(3) Ibid. 2 Ch. 527.
(4) Law Rep. 2 Ch. 412.
(5) Ibid. 527, 531–2.
(6) Ibid. 511.

Mr. *W. M. James*, Q.C., and Mr. *Eddis*, for the creditors' representative of the bank:—

We are the only persons really interested in this question, which is this, whether we are to get paid by only a fraction of the corporation shareholders, or by the whole?

How is it possible that our rights can be affected by want of notice between *Alabaster* and the bank? In what respect does our case differ from that of the creditors in *Overend's Case, Oakes* v. *Turquand* (1)? In that case, *Oakes* or *Peek* may have said, "I was induced to take these shares through fraud;" in this, Mr. *Alabaster* can only say, "I was put upon the register through a common misapprehension."

The VICE-CHANCELLOR:—In *Overend's Case* there was a contract voidable, but not void.

Mr. *James*:—The contract here was between *Alabaster* and the bank, which contract the bank might have enforced. *Alabaster* could not have been heard to say, "Oh, but before that we made a common mistake." He must be taken to have known the contents of the deed. Knowing them, he goes to the company and says, "Give me your shares;" Is not that enough?

The VICE-CHANCELLOR:—But what were the terms of that contract?

Mr. *James*:—The contract was upon no terms at all as far as the bank are concerned. What the liquidators of the corporation may have done cannot affect the bank or their creditors. The bank have nothing to do with the stoppage *in transitu* of the certificates by the corporation liquidators. Suppose they had passed these shares on to *Alabaster*, and he had sold them, would not the purchaser have been liable? When they got into the hands of the liquidators they got home to the shareholder. The legal title of *Alabaster* to the shares is, therefore, complete.

Even if either the liquidators or *Alabaster* might have filed a bill to get rid of these shares, on the ground that the contract was voidable, neither they nor he have chosen to do so before the winding-up. *Alabaster's* name is on the register, and, in the first instance—that is to say, so far as creditors are concerned—he must be retained there.

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(1) Law Rep. 2 H. L. 325.

If creditors are not to be allowed to rely on the fact of the name of the shareholder being on the register, how can the Court stop short of fixing the creditor with knowledge of every transaction between the shareholder and the company?

Mr. *Mellish*, in reply:—

I am quite willing to argue the question on the ground put by Sir *R. Palmer*; namely,—Has *Alabaster* agreed, within sect. 23 of the *Companies Act*, 1862, to become a member of the bank? *Alabaster* made no agreement with the bank. The only agreement made was between the corporation and the bank. All *Alabaster* agreed to was in effect this: "If such a state of things ever arises, that my shares are to be exchanged for those of the bank, I agree; if not, I do not agree." There was no privity of contract. That forms the substantial difference between this and *Overend's Case*, where there was an actual agreement; the only question there being: Did fraud exist so far as to entitle the shareholder to rescind the contract?

Many of the corporation shareholders refused to come in. If the corporation had been in a highly flourishing condition, probably they would all have refused. How, then, can they be considered to have become members of the company within the 23rd section?

A "proper requisition," within the wording of the letter of the 6th of June, means a requisition in accordance with the terms of the agreement. But there were no other terms of agreement than those which were stated in the deed.

The case has been argued as if, supposing *Alabaster* had been the only man who sent in a requisition, he would have been bound. But it is impossible so to construe the instrument. To make the agreement binding, the holders of all the 75,000 shares must have sent in their certificates.

The only other fact, namely, that of his having received notice of a meeting, can never be held sufficient to communicate to him the fact that he was a shareholder in the company.

If *Alabaster* knew of the fact of the dividend being declared, the circumstance of his having received no dividend warrant would be the strongest possible proof to him that he was not considered a shareholder.

Alabaster never got the share certificates; they were conditional on the face of them; and the result of the evidence is, that the liquidators kept them back with the knowledge and consent of the bank. If an attempt had been made to sell these shares, it would have been discovered that they were not ordinary shares. It would have been found from the books of the corporation that they were to be kept apart, to be used only if the arrangement should be carried out, not if it fell through.

Nov. 24. Sir G. M. Giffard, V.C.:—

This is an application on the part of Mr. *Alabaster* to have his name struck out from the list of the contributories of the *Oriental Commercial Bank.* He was a shareholder of the *Financial Corporation.* Between that corporation and the bank an agreement for what is called amalgamation was entered into, intended to be carried out through the medium of a voluntary winding up of the corporation. The basis of amalgamation was agreed to between the directors of the corporation and the bank on the 24th of March, 1865. Notice was sent to the shareholders of the corporation on the 27th. On the 12th of April, 1865, the basis was assented to at a meeting of the shareholders of the corporation. On the 9th of May, 1865, there was a second meeting, and on the 17th of May, 1865, a deed intended to bind the corporation and the bank was executed, founded on the terms and basis which had been agreed to.

This deed, and the terms and basis on which it is founded, were the subject matter of a suit which was instituted by a Mr. *Clinch* on the 10th of November, 1865. It was a suit on behalf of himself and the other shareholders in the corporation; and in that suit a decree was made dated the 28th of February, 1868. It declared:—[His Honour read the extract set out above, and continued:—]

Then there was a decree following out those declarations. The decree was appealed from and affirmed with a variation which I do not think material. It is unnecessary to read the judgments in the Court of Appeal. The arrangements were held to be void; and without going through them, I think it sufficient to state that their scope was the sale of the good-will and assets of, and an exchange of the shares in, the corporation, 75,000 in number, for 25,000 shares in the bank, with superadded conditions and provisions, which together rendered it impossible to carry out the amalgamation piecemeal. It was essential that the whole 75,000 shares should be exchanged for the whole 25,000, and the other conditions complied with, otherwise the whole must fail. This was never done, and the entire arrangements were set aside by the decree referred to.

Mr. *Alabaster*, however, assented to the intended amalgamation. He sent in the certificates of his shares in the corporation to be exchanged for shares in the bank. These he sent in to the liquidators of the corporation. The liquidators received a certificate of shares from the bank in respect of them, and Mr. *Alabaster's* name was placed on the share register of the bank as a shareholder. This was done on the 9th of September, 1865. His name was on the register from this time to the winding-up of the bank, which dates from the 12th of July, 1866. The only attempt to remove it is the present application, which commenced in January, 1867.

The most material documents as affecting Mr. *Alabaster* personally are, first, the circular of the 6th of June, 1865, and his answer; secondly, the report and balance sheet of the 22nd of February, 1866; and, thirdly, the certificate handed to the liquidators, but retained by them. Sir *R. Palmer* also read some communications between the manager of the bank and the liquidators, but unless the facts I have stated and the documents I have mentioned as most material afford sufficient ground for holding Mr. *Alabaster* to be a contributory, his application must succeed.

[His Honour here read the circular of the 6th of June, 1865; Mr. *Alabaster's* reply to that circular; the extracts above given from the report and balance sheet, presented to the directors of the bank on the 22nd of February, 1866; and, finally, the certificate of bank shares, observing that it had this important clause in the margin,

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"For account of *The Financial Corporation, Limited,* in liquidation, subject to covenants of May, 1865," thus distinctly referring to the deed of amalgamation. His Honour continued :—]

Every one of these documents and everything that took place, must necessarily be referred to the deed, and the arrangements on which it was founded. The requisition as to the certificates, and the handing them in, was consistent with this; so was the special form of the certificates; so was the balance sheet; so was the mode in which the dividends of 10 per cent. were dealt with, for though declared they were not paid, but carried over in account with the corporation on the whole 25,000 shares. The registration of Mr. *Alabaster's* name was not communicated to him. Everything that was communicated was consistent with the intended completion of the amalgamation as one entire transaction. No certificates were handed to him, nor was he ever in a position to insist on their being so handed; no allotment was made to him; no dividend was paid to him; nor was he ever entitled to receive any. He did not know his name was on the register before August, 1866, that is to say, after the winding-up. He did not believe himself to be a shareholder in the bank. He entered into no separate agreement or negotiation with the bank. All that took place was part and parcel of the amalgamation, originating from, and based on it. That amalgamation he never could have enforced against the bank or the bank against him. He had not the power to affirm or carry it out. The arrangements on which it was founded were void and not voidable merely, and this being so, I am of opinion that what has been said as to *Oakes* v. *Turquand* (1), *Downes* v. *Ship* (2), and *Lawrence's Case* (3), has no application.

In the first of these cases, there was an agreement with the individual which he could affirm, which was binding till he disaffirmed, and which he did not disaffirm previously to the winding-up. In the other cases it was in the power of the individual to adopt and insist on and obtain the benefit of what was done; and enforce his contract against the company; and adoption, arising from what he did, or neglected to do, and abstained from doing, was held to be the result.

(1) Law Rep. 2 H. L. 325.
(2) Law Rep. 3 H. L. 343.
(3) Law Rep. 2 Ch. 412.

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There is a wide difference between a voidable and a void transaction. If the transaction be void there can be no contract. In this case nothing was done or took place but what was part and parcel of the void amalgamation. Nothing transpired from which Mr. *Alabaster* ought to have known that his name was on the register, or which would be a ground for imputing that knowledge to him. He gave no authority to anyone to place it there. The placing it there was not justifiable. The liquidators rightly retained the certificates, for they referred to the deed of amalgamation, and were part of that uncompleted transaction. Mr. *Alabaster* did not individually contract to become a shareholder; neither did he do anything which estopped him from denying that he was one.

For these reasons, therefore, I am of opinion that his name ought to be taken from the list of contributories.

As regards the costs, Mr. *Alabaster* must have his costs, but having regard to the state of the affidavits, I shall deduct from those costs three-fourths of the costs of the affidavits and depositions. The costs of the liquidators and of the creditors' representative, as between solicitor and client, will come out of the estate.

Solicitors for Mr. *Alabaster:* Messrs. *Flux, Argles, & Rawlins.*

Solicitors for the Bank and Liquidators: Messrs. *Uptons, Johnson, & Upton.*

Solicitors for the Creditors' Representative: Messrs. *Crosley & Burn.*

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LR 3 PC. 724

7 Ch 124

8 Ch 920

18 Ch D 97-8

FARHALL *v.* FARHALL.

Administration—Executorship Account—Mortgage to Bank.

A. being indebted at his death to a bank for a sum, as a security for which he had deposited with them the title deeds of an estate, by his will empowered his executors to charge his real estates in aid of his personal estate. His widow and sole executrix was allowed by the bank to draw upon "*A.*'s Executorship Account," and had deposited the title deeds of part of *A.*'s real estate as a security for the increased amount due to the bank and future advances. The moneys were drawn out from time to time in small sums, and applied by the widow for her own personal expenses, and in carrying on *A.*'s farm, as well as in payment of his debts:—

Held, that, in the absence of any notice to the bank that *A.*'s widow was committing a breach of trust in applying the money for her own purposes, they were entitled in a suit for administering *A.*'s estate to prove as creditors for the amount of their advances on the executorship account secured by the deposit of title deeds made by *A.*'s widow.

ADJOURNED SUMMONS upon a claim by the *London and County Bank* as incumbrancers upon the testator's estate for the sum of £2,593 17*s.* 1*d.*, made up of a debt due from the testator, and also of sums drawn out by the executrix upon the executorship account.

Richard Farhall, the testator, was a customer of the *London and County Bank*, and having overdrawn his account, deposited with the bank, on the 20th of November, 1861, the title deeds of his *Bridge Hill Farm*, with a memorandum stating that such title deeds were to be held as a security for the sum of £1000, and all moneys which should at any time be due on the general balance of his account.

The testator died on the 11th of December, 1861, and the balance due from him to the bank at that time was £846, which, within a few days, was reduced by a payment of £114 to the sum of £732. By his will, dated the 4th of October, 1853, the testator appointed his wife, *Mary Farhall*, executrix and trustee, and three other persons (who did not act) executors and trustees of his will, directed payment with all convenient speed of all his debts, funeral and testamentary expenses, and empowered his trustees from time to time, in execution and furtherance of the

S.C. on a further claim LR 12 Eq 98 & C.B.

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trusts and purposes of the will, during the lifetime, but always by the direction in writing of his wife, to whom he gave a rent-charge of £100 a year charged upon his freehold hereditaments, to convert and get in the whole or any portion of the personal estate, and to sell by public auction or private contract, and convert into money, or exchange, the whole or any portion of the real estate . . . . and at any auction to buy in and likewise to resell, or, in aid of his personal estate, to mortgage and grant powers of sale of the whole or any portion of the same without being answerable for any loss.

The will was proved by Mrs. *Farhall* alone in May, 1863, and she alone accepted the trusts of the will, and acted in the executorship. Immediately after the testator's death she applied to the bank to allow her to draw on her late husband's account. The manager refused to honour a cheque drawn by her in her personal character; but on being referred by the widow to Mr. *Geoghegan*, a solicitor, and one of the executors and trustees named in the will, he wrote to ask whether the testator's executors authorized Mrs. *Farhall* to open an executorship account. Mr. *Geoghegan* replied that Mrs. *Farhall* was the only one of the executors who would prove the will, and that she could draw cheques on account of the testator's estate. Upon this the bank opened an account, entitled "Mr. *Richard Farhall's* Executors' Account," and honoured cheques upon it signed thus: "*Mary Farhall* for executors of *Richard Farhall.*"

Considerable sums were from time to time paid into this account, and much larger sums drawn out. At the end of 1862, the account having been overdrawn to the extent of £1171 11*s.* 6*d.*, the bank pressed for security for the current balance against her; whereupon Mrs. *Farhall* agreed to charge the property of which the bank held the title deeds, and also another portion of testator's estate called *South Eaton* and *Poundfield*, with such current balance, and on the 10th of January, 1863, deposited the title deeds with a memorandum declaring that the deeds should be held by the bank as a security for the £2000 (then due to them), and for all moneys which should at any time be due from her to them on the general balance of her account with them, and undertaking that she and all other necessary parties would, whenever required, execute a valid

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legal mortgage of the property for securing payment of the £2000 and such balance. This memorandum was signed by *Mary Farhall* "For the executors of the late *Richard Farhall.*" Mrs. *Farhall* also gave, as a further security for the balance, the joint and several promissory notes of herself and her brother for £500. On April, 1864, the balance due to the bank from the testator at the time of his death was, at Mrs. *Farhall's* request, transferred to the executorship account. In October, 1864, the bank ceased to make payments on the executorship account, which then stood at £2578 19*s.* 11*d.* against the executors, and was increased by interest and commission to £2593 17*s.* 1*d.* on the 1st of January, 1867, which sum, with interest thereon, was claimed to be due to the bank from the testator's estate.

In January, 1867, the bill in the present suit was filed on behalf of an infant daughter of the testator, beneficially interested under the will, for the purpose of administering the testator's real and personal estate.

The bank carried in their claim for £2593 17*s.* 1*d.*, in March, 1867, and, by arrangement, an order was made by consent at Chambers, on the 6th of May, 1868, for the sale of the estates, and payment out of the proceeds of the £732 2*s.* 3*d.* (which was admitted to be due to the bank from testator at the time of his death), with an inquiry as to what was due to the bank over and above that sum. In pursuance of this inquiry, the bank claimed the balance of their original claim for £2593 17*s.* 1*d.*

In his affidavit, made in support of the claim by the bank, the manager stated that "all the payments made by the bank on the said account were made in reliance upon the authority of Mrs. *Farhall* to mortgage the testator's real estate in aid of his personalty, and were made by the bank *bonâ fide*, and with every reason to suppose that Mrs. *Farhall* was properly applying the money in payments due from the testator's estate. The bank never had any knowledge, suspicion, or notice of any improper application of any of the money, even if any such improper application was made."

In the affidavits made by Mrs. *Farhall* and Mr. *Morton*, an accountant, in opposition to the claim, the application of the various sums drawn out by her from the bank upon the executorship account was shewn, from which it appeared that only £407 had been paid on account of debts and matters strictly connected with the executorship, and that the great bulk was expended for her own purposes, including maintenance and personal expenses of herself and children, "and in various speculations with regard to the purchase, sale, and farming of land" (all which speculations had proved very unsuccessful).

The manager of the *London and County Bank* had not been cross-examined upon his affidavit.

Mr. *Kay*, Q.C., and Mr. *F. Waller*, in support of the claim, contended that in the absence of any notice that the moneys drawn out by Mrs. *Farhall* on the executorship account were being applied, not in payment of the testator's debts, but for her own purposes, the *London and County Bank*, advancing the money, were entirely discharged from seeing to its application, and entitled to the benefit of their security given under the power in the will enabling the executors to charge the real in aid of the personal estate: *Watkins* v. *Cheek* (1); *Haynes* v. *Forshaw* (2); *Forbes* v. *Peacock* (3); *Sabin* v. *Heape* (4); *Greetham* v. *Colton* (5); *Stroughill* v. *Anstey* (6).

Mr. *Druce*, Q.C., and Mr. *Haddan* for the Plaintiff in the suit, contended that the case was not the ordinary one of executor or trustee mortgaging in order to pay debts, but that of bank and customer, and the nature of the account, especially having regard to the small amounts periodically drawn out, was enough to shew that this was a mere personal account, and that the security was given for advances made, not for the purposes of the will, but to the executrix on her own account, and for her own benefit. As was observed by Lord *Eldon* in *M'Leod* v. *Drummond* (7): "I cannot hold that it is competent to an executor, even against a pecuniary or residuary legatee, to go to a banker immediately after the testator's death, and to pledge the property of the testator in consideration of a loan to be then made, if the circumstances

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(1) 2 S. & S. 199.
(2) 11 Hare, 93. 17 Jur 930
(3) 1 Ph. 717.
(4) 27 Beav. 553. 5 Jur NS 1147
(5) 34 Ibid. 615. 11 Jur NS 848
(6) 1 D. M. & G. 635.
(7) 17 Ves. 170.

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shew that the banker knew he was lending the money to that person in such a manner not to be applied conformably to the duty of the executor; . . . or, though *bonâ fide,* not in the character of executor, but as a trader without any connection with that character." Applying that language to the present case, the bank were not entitled to the benefit of a charge upon the testator's estate, and had a personal demand against Mrs. *Farhall* only: *Haynes* v. *Forshaw* (1) was also referred to.

Mr. *Higgins,* and Mr. *Cottrell,* for other parties.

Mr. *Kay,* in reply, was stopped.

SIR W. M. JAMES, V.C.:—

The claim must be allowed. It is impossible, in my opinion, to draw any distinction between an advance by a banker and an advance by any other person on an executorship account, nor, again, can I draw any distinction between drawing out the money in one lump sum, and drawing it in any number of small sums, unless the bank had notice that the person drawing was committing a breach of trust by applying the money, not for the purposes of the executorship, but for his own purposes, or there were something which should have made them come to such a conclusion. It seems to me to have been, so far as the bank was concerned, honestly drawn out, and that there was no culpable negligence.

I am therefore of opinion that the bank are entitled to hold the security for the amount of their claim. I may add that I also rely on the circumstance that Mr. *Osborne,* the manager of the bank, has not been cross-examined on his affidavit.

Solicitors: Messrs. *Stevens, Wilkinson, & Harries;* Messrs. *Mercer & Mercer;* Messrs. *G. S. & H. Brandon;* Messrs. *Lewis, Munns, & Co.*

(1) 11 Hare, 93. 17 Jur 930

GRISSELL *v.* SWINHOE.

V.-C. J.
1869
Jan. 23, 25.

Will—Legacy—Derivative Interest—Election.

A testator, being entitled under a settlement, subject to a life interest, to a moiety of a fund, by will, after reciting (erroneously) that he was, under the settlement, "subject to the trusts therein contained," entitled to the whole, purported to bequeath the whole, and to give one moiety to the husband of the lady who was really entitled under the settlement to a moiety of the fund:—

Held, that the husband, who had become his wife's administrator, was not bound to elect between the legacy and his wife's moiety.

6 Ch 15, 17, 19
21
7 HL 59, 76
79
6 Ch D. 677

BY a settlement, dated the 12th of January, 1848, made shortly before the marriage of *George Edmund Higgins*, of *Calcutta*, and *Elizabeth Frances Herd*, a trust fund was settled upon trust to pay the income to the intended wife for life, for her separate use, and after her decease, and failure of children of the marriage (which happened), and in default of appointment by *George E. Higgins* (which also happened), "in trust for such person or persons who would under the *Statute of Distributions* be entitled to the personal estate of the said *George Edmund Higgins* in case he died intestate, and in the like shares and proportions as such person or persons would be entitled thereto."

George Edmund Higgins died in March, 1848, leaving his widow, *Elizabeth Frances Higgins*, and his father, *George Higgins*, surviving. Shortly after his death the trust fund became represented by a sum of 25,300 rupees.

Mrs. *Higgins* afterwards married the Defendant, *Henry Swinhoe*.

George Higgins, the father, died in April, 1855. By his will, dated the 14th of October, 1852, after reciting that under the marriage settlement he was, "subject to the trusts therein contained" in favour of the widow of his son, then the wife of *Henry Swinhoe*, entitled to the sum of 25,300 rupees, he gave and bequeathed the said sum of rupees in equal moieties to *Henry Swinhoe*, and his (testator's) daughter, *Charlotte Julia*, wife of Major *Charles Grissell*, for his and her absolute use and benefit respectively. The testator directed that if either or both of them, the said *Henry Swinhoe* and *Charlotte Julia Grissell*, should die before his (testator's) decease, the bequest thereby made to him, her, or them respectively should not lapse, but should be payable to his, her, or their executors or administrators respectively.

Mrs. *Grissell* died in her father's lifetime.

Major *Grissell* died on the 3rd of July, 1855, having by will, dated the 23rd of August, 1850, appointed three executors, of whom only one, the Plaintiff, *Thomas Grissell,* proved the will.

Mrs. *Swinhoe* died on the 11th of August, 1866, and letters of administration to her personal estate were granted to the Defendant, *Henry Swinhoe.*

On the 20th of March, 1868, letters of administration to the personal estate of Mrs. *Grissell* were granted to the Plaintiff, *Thomas Grissell.*

This bill was filed on the 27th of March, 1868, by *Thomas Grissell,* against *Henry Swinhoe* and the trustees of the settlement, for performance and execution of the trusts; and the following question was raised:—

The Plaintiff claimed one moiety of the fund; submitting that, inasmuch as *George Higgins,* the father, purported by his will to dispose of the whole fund, the Defendant, *Henry Swinhoe,* was bound to elect whether he would claim the moiety to which his late wife was entitled under the settlement, and which *George Higgins* purported to bequeath by his will, against the disposition thereof made by the will; or whether he would confirm such disposition.

The Defendant, *Henry Swinhoe,* on the other hand, claimed to be entitled to three-fourths of the fund—that is to say, to two-fourths as the administrator of his late wife, Mrs. *Swinhoe,* and to one-fourth under the will of *George Higgins.*

The children of Mrs. *Swinhoe* were made Defendants by amendment; but their claim to a share in the fund, arising out of a supposed re-settlement of the fund in May, 1860, was not pressed at the hearing.

Mr. *Druce,* Q.C., and Mr. *Fischer,* for the Plaintiff:—

Upon the construction of this clause in the settlement it may be contended that the persons meant are the persons who would answer the description at the date of the settlement; or those who

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would answer the description at *George Edmund Higgins'* death; or, thirdly, those who would answer the description at the death of the survivor of the husband and wife. The Court will probably hold the second of the above to be the true construction.

The VICE-CHANCELLOR assented.

Mr. *Druce*:—We then say that *Henry Swinhoe* is bound to elect. There can be no doubt that the testator intended to deal with the whole fund, subject to Mrs. *Swinhoe's* life interest.

The expression in his will, "subject to the trusts therein contained," confirms this view. A person considering himself to be part owner would never describe himself as entitled to the whole, subject to a trust in favour of his co-owner.

In *Padbury* v. *Clark* (1) a testator, being entitled to the moiety of an estate, purported to give the whole specifically. His niece, who was, in fact, entitled to the other moiety, took a benefit under the will; and she was held bound to elect.

In *Howells* v. *Jenkins* (2) a testator, being entitled to the moiety of two farms, created a life interest in all his real and personal estate, and then devised one farm subject thereto to *W.* and *E.* *W.* was really entitled to one-fourth of the two farms already. He was held bound to elect.

In *Grosvenor* v. *Durston* (3) a testator, whose only funded property consisted of Long Annuities, which he had purchased in the joint names of himself and his wife, gave away his funded stock generally. He also made a provision for his widow; and she was held bound to elect.

Wintour v. *Clifton* (4) shews that an express declaration is not necessary in order to establish an intention on the part of a testator to dispose of more than belongs to him; it may be presumed from the frame and language of the instrument.

Mr. *J. T. Humphry*, for the Defendant, *Henry Swinhoe*:—

No case of election arises here, either in respect of the subject matter of the gift, or in respect of the person benefited.

The rule is, that the intention of the testator to dispose of the

(1) 2 Mac. & G. 298.
(2) 2 J. & H. 706.
(3) 25 Beav. 97.
(4) 8 D. M. & G. 641. 3 Jur. N.S. 74

property which is not his own must be clear; if not from express declaration, at least by necessary implication. It must be shewn to be impossible that he could have meant anything else.

Does that appear in this instance? The testator carefully describes the property, and then makes the gift "subject to the trusts" in the settlement contained in favour of his son's widow. We submit he must be held to have intended to give no more than he was entitled to give.

The second point decided in *Howells* v. *Jenkins* (1) is in our favour. Testator being entitled to half of two farms, purported to give the whole to *L.* for life (who was really entitled to one-fourth absolutely), and after his death to give one farm to the Plaintiffs. The Plaintiffs, who had purchased *L.'s* interest in remainder, were not put to their election.

In *Stephens* v. *Stephens* (2) it was held, that an incumbrancer on one part of the testator's property, taking a beneficial interest under the will in another part, was not bound to elect. A devise of an estate means a devise subject to existing incumbrances.

Here the testator has made no gift to Mrs. *Swinhoe.* True it is that *Henry Swinhoe* became entitled to Mrs. *Swinhoe's* estate, but there can be no election between what a man takes under a will and what he takes under a derivative title: *Lady Cavan* v. *Pulteney* (3).

The VICE-CHANCELLOR:—Mrs. *Swinhoe's* estate might have been required for payment of debts.

Mr. *Humphry*:—Or she might have survived her husband.

Mr. *Bell*, for the trustees.

Mr. *Swanston*, Q.C., for the children.

Mr. *Druce*, in reply:—

It is impossible to satisfy the language of the testator without supposing that he intended to deal with the whole of this property.

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(1) 2 J. & H. 706. (2) 3 Drew. 697; 1 De G. & J. 62. 3 Jur Ns 1525
(3) 2 Ves. 544; 3 Ves. 384.

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It cannot be denied that at the time when the Defendant *Swinhoe* made this claim he had an independent interest. If all the property had gone to pay debts, the question of election would never have arisen, that is all.

The Defendant *Swinhoe* cannot take the fourth bequeathed to him under the will without making compensation to us for the amount out of his wife's moiety.

SIR W. M. JAMES, V.C.:—

I think, upon the first point, my strong impression would be in favour of Mr. *Druce's* argument. I should have said that the gift of 25,300 rupees was such as to make a case of election. There is no question that if without recital the testator had given a sum of 25,300 rupees in the way in which he has given that amount, that would be a gift of the whole, which he had no right to give. The foundation of the claim would be, that the testator had given something which he had no right to give, and which he must be assumed to have intended to give.

Then the question arises, whether the words of the gift here are controlled by the words "subject to the trusts;" and upon that, as I am going to decide the case upon the other point, I only say that the strong inclination of my opinion is, that the words "subject to the trusts therein contained" refer to the trusts to which the whole fund was subject. But, except the life estate of the widow, there was nothing to which the fund was subject. The rights of tenants in common are not rights of one subject to the other. They are co-tenants, having an equal right. You cannot say that if a man has a right to half a house, he has that subject to the right of another person to the other half. Therefore, upon the mere question of the construction of the will, I should have arrived at a conclusion against the legatee.

But, upon consideration of the circumstances of this case, I am of opinion that no case of election arises, because the gift is to *Henry Swinhoe* in his own right, and the claim is by him as the representative of Mrs. *Swinhoe*. True it is that the representative of Mrs. *Swinhoe*, being her husband, would be entitled to the ultimate surplus, whatever that may be, of that which he took as her personal estate. But that is a mere incident to her estate.

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The result will be that the fund is divisible in fourths; three-fourths going to *Henry Swinhoe*, and the remaining fourth to the Plaintiff.

The costs of all parties, as between solicitor and client, will come out of the estate; and all further proceedings will be stayed, with liberty to apply.

Solicitors for the Plaintiff: Messrs. *James & John Hopgood.*

Solicitor for the Defendant: Mr. *J. S. Judge.*

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1869
Feb. 10.

SLADE *v.* BARLOW.

Partition Suit—Legal Question—Rolt's Act—Bill retained, with Liberty to bring an Action.

8 Eq 494-5
496

Plaintiff, claiming to be legally entitled to an undivided share in a freehold estate, filed a bill for partition, raising the question of whether, upon the construction of the settlor's will, the estate passed under a specific or under a residuary devise:—

Held, that the Court had no jurisdiction to try such a question in a partition suit; and bill ordered to be retained for a year, with liberty to the Plaintiff to bring such action as he might be advised.

Application that the Defendant might be put on terms not to set up the defence of the Statute of Limitations refused.

IN March, 1805, the testator, *Jeremiah How*, was admitted as tenant, according to the custom of the manor of *Brownswood*, to a copyhold estate at *Hornsey*, in the county of *Middlesex*, which he thereupon duly surrendered to the use of his will. He entered into possession of the estate, and farmed the same for his own benefit until his death. The copyhold lands held of this manor were subject to the custom of gavelkind.

On the 16th of May, 1831, in exchange for a part of the above copyhold estate, the testator took from the *New River Company* a piece of land, No. 9, to which he was admitted on the 18th of May, 1831, as tenant according to the custom of the same manor.

On the 17th of January, 1833, he made his will, which contained the following clause:—

"I give and devise unto my son, *Samuel James How*, all that my copyhold estate situate at *Hornsey*, which I have surrendered to the use of my will, with the hereditaments and appurtenances thereunto belonging, to hold the same unto him, my said son, *Samuel James How*, his heirs and assigns for ever, according to the custom of the manor."

Testator afterwards devised and bequeathed all the rest, residue, and remainder of his estate and effects, of what nature or kind soever, unto his three sons, *Jeremiah*, *Thomas*, and *Samuel James How*, and his daughter, *Alice Slade*, equally between them, share and share alike.

He died in February, 1834.

After his death *Samuel James How* entered into possession of the copyhold estate and the piece of land, No. 9, and so continued till his death in 1847. By his will *Samuel James How* devised his copyholds in the manor of *Brownswood* to his brother, *Thomas How*.

After the death of *Samuel James How*, *Thomas How* entered into possession of the copyhold estate and piece of land, and so continued till his death in 1852. By his will *Thomas How* bequeathed the residue of his property (including the above copyhold estate and piece of land) to his wife *Harriet* for life, she disposing of the principal at her decease among his children as she might in her discretion think best.

Harriet How, on the 3rd of August, 1854, procured herself to be admitted as tenant to the copyholds, and she remained in possession of the lands, including No. 9, until the 11th of December, 1867.

By deed, dated the 20th of December, 1861, she, with the consent of her children, enfranchised the estate.

By deed, dated the 11th of December, 1867, *Harriet How* and her children conveyed the estate, including the piece of land, to the Defendant, *Frederick Barlow*, his heirs and assigns, who had since been in possession.

The Plaintiffs, *William George Slade* and *Jeremiah Slade*, the heirs-at-law in gavelkind of *Alice Slade*, who died under coverture on the 29th of June, 1858, filed this bill on the 27th of March, 1868, against *Frederick Barlow*, alleging that upon the death of

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Jeremiah How his three sons became entitled at law, as his heirs according to the custom of the manor, to the piece of land, No. 9, and that *Alice Slade* became in equity the owner of an undivided fourth of the same piece of land; and praying for a partition.

On the 22nd of May, 1868, the Defendant filed an answer, stating the fact of the surrender of the copyhold estate to the uses of *Jeremiah How's* will before the date of his will, and submitting that the piece of land passed under the will to *Samuel James How* and his heirs, according to the custom of the manor, by virtue of the devise to him. The answer also stated the facts as to possession, and set up the Statute of Limitations.

The Plaintiffs then, on the 3rd of September, 1868, amended their bill, alleging that the piece of land was never surrendered to the use of *Jeremiah How's* will, and that under the residuary devise contained in that will the three sons of *Jeremiah How*, and his daughter, *Alice Slade*, became entitled to the piece of land in equal shares as tenants in common; and praying for a partition as before.

The cause now came on upon motion for decree.

Mr. *Kay*, Q.C., and Mr. *Charles Hall*, for the Plaintiffs.

Mr. *Joshua Williams*, Q.C., and Mr. *C. J. Shebbeare*, for the Defendant:—

We object *in limine* that this is an ejectment bill. Such a bill was by Vice-Chancellor *Stuart* ordered to be retained for a year, with liberty to the Plaintiff to bring an action; and this decision was affirmed by the Lords Justices: *Bolton* v. *Bolton* (1).

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(1) 1868. July 21. L. JJ.

BOLTON *v.* BOLTON.

8 L 9494 -5/-6

GEORGE BOLTON the elder, by will made in 1834, as alleged by the bill, devised an estate to his son, *George Bolton*, and proceeded to direct, that if *George Bolton* the son died before his (the son's) wife *Elizabeth*, she should possess the land for her life; and after her death the testator devised it to his five grandchildren. The testator died in 1834. *George Bolton* the son, who was the testator's heir-at-law, possessed the property till his death in 1865. His wife *Elizabeth* died in his lifetime. He left a will, by which he devised the property in fee to the Defendant, *George Bolton*, who was one of the five grandchildren named in the will of the original testator. Upon the death of *George Bolton* the son, the Defendant *George Bolton*, entered into possession of the property, and had remained in possession ever since. The Plaintiff, who was another of the five grandchildren, filed

SC at law 5 Ex 145.

Mr. *Kay*:—The question to be decided is one of construction, whether this piece of land passed under the devise of the estate

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a bill for a partition. The Defendant, *George Bolton*, by his answer, alleged that he was entitled as devisee of the heir of *George Bolton* the elder, and that the Plaintiff had never been in possession; and the Defendant claimed to have it tried by proceedings at Law whether *George Bolton* the elder had devised anything to the Plaintiff.

Vice-Chancellor *Stuart* held that the Plaintiff had no right to relief till he had established his title at Law. His Honour, therefore, retained the bill for a year, with liberty to the Plaintiff to bring an action. The Plaintiff appealed.

Mr. *Joshua Williams*, Q.C., and Mr. *Bagshawe*, for the Appellant, referred to 21 & 22 Vict. c. 27 (*Lord Cairns' Act*); 25 & 26 Vict. c. 42 (*Sir John Rolt's Act*); *Baring* v. *Nash* (1 V. & B. 551); *Agar* v. *Fairfax* (17 Ves. 533); *Potter* v. *Waller* (2 De G. & Sm. 410).

Mr. *Greene*, Q.C., and Mr. *W. Pearson*, for the Defendant, *George Bolton*, were not called upon.

Sir W. Page Wood, L.J.:—

The question upon the statute, 25 & 26 Vict. c. 42, is involved in some degree of difficulty; but I shall say little upon it, since we do not give it such full consideration as we should have done if our view as to the effect of the will had been different from what it is. The position of the parties is this. The Defendant, *George Bolton*, says in effect: "You set up one will, I set up another. I do not abandon the property, even if you establish the will you set up; but I say that I know nothing about that will. I know that the alleged testator was the owner of this property, and that my devisor was his heir, and I say that he entered as heir. I am in possession under a title derived from him, and you cannot, by alleging a will about which I know nothing, bring the matter into Equity." Now, I am desirous of giving full effect to the provisions of the Act of Parliament to which I have referred, and of preventing matters from being litigated first before one tribunal, and then before another; and I should wish to give much more consideration to the present case if the Plaintiff and the Defendant were claiming under the same instrument, so that there was nothing to be decided between them but a question upon its construction. But here the Defendant says to the Plaintiff, "You are claiming under colour of a will which I do not admit; I am in possession, and I wish not to be ousted from a trial by jury. I wish to have your legal right tried before you come here for a partition, to which you can only be entitled as tenant in common under the will of *George Bolton* the elder, which you are not yet competent to set up against me as a valid instrument." I should feel great difficulty in saying that the Vice-Chancellor was wrong in acceding to this view; and the inclination of our minds being against the Plaintiff on the construction of the will which he sets up, I am satisfied that we are right in dismissing the appeal with costs.

Sir C. J. Selwyn, L.J.:—

I also am of opinion that the order of the Vice-Chancellor is at least as favourable an order as the Plaintiff is entitled to. I think it unnecessary to decide the question which arises upon the construction of *Sir John Rolt's Act*.

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"with the hereditaments and appurtenances," or under the residuary clause?

The VICE-CHANCELLOR said that this appeared to be an attempt, under colour of a partition suit, to get a construction of a will against a Defendant in possession of the property.

Mr. *Kay*:—By *Sir John Rolt's Act* (25 & 26 Vict. c. 42), it is provided that the Court of Chancery is to determine every question of law and fact cognisable in a Court of Common Law, on the determination of which the title to the relief in Equity depends. This objection was not taken by the answer.

Mr. *Shebbeare*:—It could not arise until the bill was amended.

Mr. *C. Hall*:—The Plaintiff might formerly have proceeded by writ of partition; and she is now entitled to sue in Equity.

The VICE-CHANCELLOR:—I shall, of course, follow the precedent which has been made by Vice-Chancellor *Stuart*, and the Court of Appeal, in *Bolton* v. *Bolton*.

It has been said that this Court is perfectly competent to try the questions which have been raised. But, in truth, that is not the state of the law. Seeing that the real object of the suit is to re-

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Apart from that Act the course of the Court is, in my opinion, correctly laid down by the Lord Justice *Knight Bruce*, when Vice-Chancellor, in *Potter* v. *Waller* (2 De G. & Sm. 410), where he says, that it has been stated as a simple proposition that a bill for partition cannot be made the means of trying a disputed title. That is according to my experience, and it is fortified by counsel of great eminence, who being asked whether they knew of any instance where a disputed title has been tried by means of a bill of partition, were unable to bring forward any such case. A serious question, however, arises, whether that which has been the course of the Court has not been altered by the Act? That question we do not decide, because the inclination of our opinion is, that if we were called upon to construe this will, assuming it to have been duly executed, we should hold that the Plaintiff has not established that title upon which alone his right to partition depends. [His Lordship then adverted to some of the points arising on the will.] I do not wish to prejudice more than is necessary the case of the Plaintiff; and I think it sufficient to say that the order made is at least as favourable as anything he is entitled to.

Solicitors: Messrs. *Iliffe, Russell, & Iliffe*; Messrs. *Skilbeck & Griffith.*

cover the possession of land under a legal title, and that all the questions raised are legal questions, it certainly would be straining *Sir John Rolt's Act* very far to say that these questions can be determined by the Court of Chancery.

Following the above decision, I shall direct the bill to be retained for a year, with liberty to the Plaintiffs to bring such action at law as they may be advised.

Mr. *Kay* asked that the Defendant might be put under terms not to set up the defence of the Statute of Limitations.

Mr. *Williams, contrà,* referred to *Sutton* v. *Smith,* before the Court of Common Pleas, January 19, 1869.

Mr. *Kay*:—There a decision had been come to at Law, and the attempt was to get rid of that decision by a new proceeding. There has been no decision adverse to us.

The VICE-CHANCELLOR:—Here there is a litigation. The suit for a partition is based on the assumption that there is no litigation.

The reason why the bill is retained is this, that it may possibly turn out that the Plaintiffs are tenants in common. I retain the bill only in order that in that event this suit may be made available. It was never intended that the right to retain should be used as a means of altering the position of the parties in the common law proceedings.

The application must be refused.

Solicitors for the Plaintiffs: Messrs. *S. F. Langham & Son.*

Solicitors for the Defendant: Messrs. *Oldershaw & Son.*

V.-C. J.
1869
Jan. 30.

In re PEAT'S TRUSTS.

Act of Limitations for India, No. XIV., *of* 1859—*Foreign Law — Lex Loci or Lex Fori—Claim in respect of immoveable Property—Tenancy in Common —Common Agent—Presumed Grant—Legal Ouster.*

Tenants in common of house property in *Calcutta*, under the will of a testator who died in 1803, became, in 1825, reduced to two. The property had all along been considered as leasehold, in which view one of the surviving co-tenants would, in the events that had happened, be entitled to five-ninths and the other to four-ninths of the property; and the rents had been received by a common agent, and shared accordingly. In 1827 the supposed owner of the four-ninths settled her share, describing it as a moiety. This description was, nevertheless, treated as an error, and the rents were continued to be received as before, and to be shared in the same proportions, until 1864, when it was discovered that the property was freehold, upon which footing the supposed owner of the five-ninths would really be entitled to four-fifths, and the supposed owner of the four-ninths to one-fifth only.

In 1859 an Act of Limitations for *India* was passed, which provides that no suit for the recovery of immoveable property shall be maintained in any Court within the British territories in *India* unless the same, if instituted after two years from the passing of the Act, be instituted within twelve years from the time when the cause of action arose.

The property having been sold, and the proceeds paid into Court, the owner of the three-fourths claimed, upon Petition, to be entitled to that proportion of the fund:—

Held that, under the English law, the Court would, after so long a possession and user, have presumed a grant:

Held, further, that under the same law the Court would have held the settlement in 1827 by one of the co-tenants to have been a legal ouster of the other:

Held, further, that the case was governed by Indian law; that under the provisions of the Act of the Indian Legislature the claim of the Petitioner had become barred, and that he was entitled to five-ninths only of the fund.

SAMUEL PEAT, formerly of *Calcutta*, but afterwards, and at the time of his death, of *Mount Pleasant, Northallerton, Yorkshire*, died in or about 1803, possessed of house property in *Calcutta*, to which, under his marriage articles and will, his children became entitled in equal shares as tenants in common.

He left five children, *Richard Josiah*, *Eliza Henrietta*, *Charlotte*, *Caroline Mary*, and *William Holbrooke Peat.*

In 1821 *Charlotte Peat* died intestate, leaving her brother *Richard*

Josiah her heir-at-law, and her brothers and sisters her next of kin.

In 1824 *Caroline Mary Peat* died intestate, leaving her brother *Richard Josiah* her heir-at-law, and her brothers and sister her next of kin.

In 1825 *William Holbrooke Peat* died, intestate as to real estate according to the law in force at *Calcutta;* but having, by a document in the nature of a will, dated the 14th of February, 1825, which, in December, 1827, was admitted to probate, bequeathed two-thirds of his estate to his brother *Richard Josiah*, and the remaining third to his sister *Eliza. William* left his brother *Richard Josiah* his heir-at-law.

Down to this period, and thenceforward until 1864, the *Calcutta* property was always treated as being leasehold, and the income was shared by the owners on that understanding. According to this view, *Richard Josiah Peat*, from and after his brother *William's* death, was considered entitled to five-ninths, and *Eliza Henrietta* to four-ninths, of the property; and they shared the proceeds accordingly.

In August, 1827, *Eliza Henrietta Peat* married *John Sheppard*, and by a settlement made prior to the marriage, and dated the 6th of August, 1827, after reciting that *Eliza Henrietta Peat* was possessed of "a moiety or equal undivided half part or share of and in the said messuages at *Calcutta*, with their appurtenances, for the respective residues of several terms of years then to come and unexpired therein respectively," it was witnessed that "all that moiety or equal undivided half part of her, the said *Eliza Henrietta Peat*, of and in" the said messuages and premises in *Calcutta* were assigned to trustees upon certain trusts therein mentioned during the lives of *Eliza Henrietta Peat* and *John Sheppard*, and after the death of the survivor, upon trust to sell the same premises, and to stand possessed of the purchase-moneys and investments thereof, and the income of the same, and of the messuages and premises, until sale, upon certain trusts for the benefit of the children of the marriage.

On the 4th of November, 1831, *Richard Josiah Peat* died, having by will dated the 8th of February, 1831, bequeathed his real and personal estate, including his parts or shares of hereditaments at *Calcutta*, to four trustees therein named, upon certain trusts for

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the benefit of his widow, *Charlotte Eliza*, for life, and after her death, of his son, *Frederick Holbrooke Peat*, and his children.

In the year 1856 Mrs. *Sheppard*, having survived her husband, died, leaving three children, *Henrietta Maria, John Edward*, and *Frances Anne*, wife of the Rev. *Thomas Smith.*

In 1864 Mrs. *Peat*, and her son *Frederick Holbrooke Peat*, requested their trustees to join with the children of Mrs. *Sheppard* in a sale of the *Calcutta* property; and an examination of the title was made. The result was, that in December, 1864, a firm of *Calcutta* solicitors wrote to say that the tenure of the property might be considered freehold, a ground rent being payable to Government; and this, on investigation, was found, in September, 1865, to be the case.

In June, 1866, a Petition, of which the present was an amendment, was presented by the trustees of *Richard Josiah Peat's* will under the 30th section of the 22 & 23 Vict. c. 35, asking for the opinion and advice of the Judge as to whether the Petitioners were, under the circumstances, barred from recovering against the persons entitled under Mrs. *Sheppard's* settlement more than five-ninths of the *Calcutta* property, and the purchase-moneys thereof, and whether the Petitioners could safely accept and receive only five-ninths of the rents and purchase-moneys.

On the 11th of June, 1866, Vice-Chancellor *Wood* directed the Petition to stand over, and be amended by being intituled in the Trustee Relief Acts, with liberty to the parties to proceed to a sale, and to bring the purchase-moneys into Court, without prejudice.

On the 18th of August, 1866, an agreement was entered into between the parties who were *sui juris*, that the purchase-moneys should, after deducting the costs, charges, and expenses of and incident to the sale and the Petition, and the remitting the moneys to *England*, be paid into Court. On the 13th of March, 1867, part of the property was sold.

The Petition, as now amended, was presented by the trustees of *Richard Josiah Peat's* will, and *Frederick Holbrooke Peat* and his infant children; the Respondents being Mrs. *Peat*, Mrs. *Sheppard's* children, Mrs. *Smith's* trustees, and certain agents.

The Petition stated that when Mrs. *Sheppard's* settlement was prepared, the parties must have been under the impression that

William H. Peat had died intestate as to personal as well as to real estate, and that consequently the settlement professed to deal with one moiety of the fund as the true amount of Mrs. *Sheppard's* share.

It also stated that down to October, 1866, the rents of the *Calcutta* houses, when remitted by the *India* agents to the agent of all parties in this country, were divided by Mrs. *Peat* and Mrs. *Sheppard's* children in the proportions of five-ninths to the former and four-ninths to the latter; also that there was now standing in Court a sum of £15,388 16*s.* 10*d.* bank annuities In the Matter of *Samuel Peat's* Estate and of *Peat's* and *Sheppard's* Trusts, representing purchase-moneys. The Petitioners submitted that the trustees of *Richard Josiah Peat's* will were entitled to four-fifths of the fund; the Respondents contended that they were barred by the Statute of Limitations from claiming more than five-ninths.

Mr. *Willcock,* Q.C., and Mr. *G. Williamson,* for the Petitioners:—

That the tenure of land in *Calcutta* is of the nature of freehold appears from *Freeman* v. *Fairlie* (1).

It will not be disputed that prior to 1859 the English statute law of limitations extended to *India.*

On the 4th of May, 1859, the Act of Limitations for *India,* No. XIV. of 1859, was passed (2). The Respondents will no doubt con-

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(1) 1 Moo. Ind. App. 305.

(2) Act No. XIV. of 1859 for *India,* intituled, "An Act to provide for the Limitation of Suits," provides as follows:—

After reciting that "it is expedient to amend and consolidate the laws relating to the limitation of suits;" it enacts,

"I. No suit shall be maintained in any Court of judicature within any part of the British territories in *India* in which this Act shall be in force, unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any law or Regulation to the contrary notwithstanding; and the periods of limitation, and the suits to which the same respectively shall be applicable, shall be the following, that is to say":—

. . . .

12. "To suits for the recovery of immoveable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose."

XIII. "In computing any period of limitation prescribed by this Act, the time during which the Defendant shall have been absent out of the British territories in *India* shall be excluded from such computation, unless service of a summons to appear and answer in the suit, can, during the absence of such Defendant, be made in any mode prescribed by law."

XVIII. "All suits that may be now

tend that by analogy to the rule laid down in paragraph 12 of sect. 1 of that Act, we are barred, inasmuch as we did not institute this claim within twelve years from the time when "the cause of action arose."

We say that the principle of English common law, which will be followed by this Court, is, that there has been no adverse possession by the Defendants, to enable a cause of action to arise, prior to 1864, when this mistake was first discovered. Up to that time all, and finally both, the tenants in common had been in possession by their common agent, and the possession of one tenant in common is the possession of the other: *Culley* v. *Doe* d. *Taylerson* (1).

Mr. *Druce,* Q.C., for Mrs. *Peat,* supported the same view.

Mr. *Mackeson,* Q.C., and Mr. *Streeten,* for the children of Mrs. *Sheppard:*—

The proposition of the other side is, that after a forty-six years' uninterrupted enjoyment of this property since 1821, on the understanding that the Petitioners and Respondents were entitled in proportions which, after 1825, became that of five to four, the whole of this undisturbed possession and user is to be set aside, and go for nothing; and the Court is now asked to say that the present claimants and we are entitled in the proportion of four to one.

We say, first, that there was a conversion under *Samuel Peat's* will. [This point was not pressed.]

Secondly, we say, that the old principle of no adverse possession between co-tenants has no application here.

Thirdly, we say that, considering this long period of acquiescence, the Court will, if necessary, presume a grant.

Fourthly, we say the question is wholly to be governed by the Act of Limitations for *India.*

As to the first point, *Doe* v. *Prosser* (2) decides that in *Eng-*

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pending or that shall be instituted within the period of two years from the date of the passing of this Act shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted after the expiration of the said period, shall be governed by this Act, and no other law of limitation; any statute, Act, or Regulation now in force notwithstanding."

(1) 11 Ad. & E. 1008, 1014; 3 Per. & Dav. 539, 548.

(2) 1 Cowp. 217.

and thirty-six years' sole and uninterrupted possession by one tenant in common, without any claim set up by his companion, is a sufficient ground for a jury to presume there has been an actual ouster of the co-tenant. Moreover, Mrs. *Sheppard's* settlement of a moiety in 1827, mistaken as it was with respect to the true proportion of her share, operated as a legal ouster.

Then, as to this Act of the Governor-General in Council, its effect, as appears from sect. 18, after the 4th of May, 1861, became wholly retrospective. No doubt the English Statute of Limitations formerly prevailed in *India: East India Company* v. *Oditchurn Paul* (1); but this Act entirely does away with the technical rules of English law.

The only question raiseable under the Act is whether its operation is excluded by the 13th section. If the case turns solely on the ground of the Petitioners' absence from *India*, their case must fail.

Upon the whole, we submit that our undisturbed possession of five-ninths of this property since 1821 must settle the question.

Mr. *Willcock*, in reply:—

In a case of mistaken rights, such as this, a Court of Equity will hold the period of limitation to run from the time of the discovery of the mistake: *Brooksbank* v. *Smith* (2).

But here there was no adverse possession. The very point is touched in a judgment of Mr. Baron *Alderson* in *Denys* v. *Shuckburgh* (3). [*Fairclaim* v. *Shackleton* (4) was also cited].

SIR W. M. JAMES, V.C.:—

In this case the testator died in the year 1803, and from that time to the present the property has been enjoyed by his family. Rights are alleged to have accrued different from the enjoyment as far back as the year 1821. From the year 1821 until the time of the sale, which, I understand, has taken place recently, the property has been held by the family, and made the subject of a family settlement—at all events, in one case—upon the footing that one branch of the family were entitled to five-ninths, and that the other branch of the family were entitled to four-ninths only, of the property.

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(1) 7 Moo. P. C. 85.
(2) 2 Y. & C. Ex. 58.
(3) 4 Y. & C. Ex. 42, 52.
(4) 5 Burr. 2604, 2607.

I am asked now to say that all this is wrong in consequence of a mistake, and that, notwithstanding all this long enjoyment, notwithstanding that the families have gone on in the belief that these were their real rights, and that they were so entitled to the property, it is not now too late to restore the property to that which was alleged to have been the rightful state of enjoyment and possession in the year 1821.

If this had depended solely on English law, I do not think that I should have acquiesced in the argument of Mr. *Willcock*. I am of opinion that it would have been the duty of any Court of Law to have presumed a grant, or family arrangement, or some instrument which would have legally sustained that which has been the subject of such very long and uninterrupted enjoyment.

I am further of opinion that, according to the technical rules of law which apply in this country with regard to claims as between tenants in common, the marriage settlement made in 1827 would have amounted to an actual ouster of the other tenant in common. It was the assertion of a distinct claim to a moiety of the property, which was afterwards reduced, under circumstances which have been explained, to four-ninths, but it was an assertion by the lady who afterwards became Mrs. *Sheppard* of a right by her to the enjoyment of four-ninths of the property. That was an adverse claim, and the rents have been paid in accordance with that adverse claim from the year 1827 until the present time.

I think that nothing more was required to meet the requisitions of the law as to an ouster by a tenant in common. It is not material that there was a common agent at that time. The case is exactly in the same position as if Mrs. *Sheppard* had appointed a distinct agent from the *Peats*, and that agent had been in receipt of the four-ninths for her from that time to this. The agent, though the common agent, was acting for the *Sheppard* family in respect of the four-ninths.

I say, therefore, if the question depended entirely upon English law, I should have come to a conclusion adverse to the claim of the Petitioners.

But the matter is made entirely clear, according to my view, by the Act of the Indian Legislature. The Indian Legislature framed its own Statute of Limitations. They were perfectly well conversant with the English Statutes of Limitation. They had those statutes before them, and they were minded to sweep away the whole technicalities of the English law. They introduced one simple form of Statute of Limitations, which rendered it unnecessary for them to make provision for the case of tenants in common, or coparceners, which otherwise, beyond all doubt, in 1859, having the statute of 3 & 4 Will. 4 before them, they would have done. In my opinion, they intentionally avoided mentioning any special case of the kind, because they were minded in simple and plain language to say there shall be one Statute of Limitations with respect to all claims; and accordingly they say that as to suits for the recovery of immoveable property, or any interest in it to which no other provision of this Act applies, the period of twelve years from the time the cause of action arose shall be the period of limitation. The Indian Legislature has said, in so many words, that wherever there is no other limitation to immoveable property the period of twelve years shall be the limit from the time when the cause of action arises; and this applies equally whether it is the case of a party wholly out of possession, or of a tenant in common who has been in possession of less than his share. Then they saved existing rights for two years only.

Now in this case, of course, the period of two years has long since passed; and I am of opinion that at the time when this sale took place, according to the law of *India*, which was the law governing this case, it would have been utterly impossible for the *Peat* family to have sustained any suit to recover any part of the four-ninths from the *Sheppard* family.

The declaration will be that the capital and income are divisible into ninths; and that the *Peat* family are entitled to five-ninths, and the *Sheppard* family to four-ninths; and the fund will be divided accordingly. The costs, as between solicitor and client, will come out of the estate.

Solicitors for the Petitioners: Messrs. *Williamson, Hill, & Co.*

Solicitors for the principal Respondents: Messrs. *Baxter, Rose, Norton, & Co.*

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eb. 12.

BRICKENDEN *v.* WILLIAMS.

Power—Feme Covert—Appointment of whole Fund to Executors, and Gift of Legacies which did not exhaust the Fund—Destination of Surplus.

9 Eq 428-9,
10 Eq 3,
13 Eq 155
3 P. Wm 145.
1 Ch. D. 208
12 Ch. D. 671-2
16 Ch. D. 21-6
29. 30-2
17 Ch. D. 153,

By a marriage settlement a fund was settled upon such trusts as the wife should, notwithstanding coverture, by deed or will appoint; and in default of appointment, in case (which happened) there should be no issue of the marriage, in trust for such persons as should at the death of the survivor of the husband and wife be the next of kin of the wife. By her will, which purported to be in exercise of the power, the wife devised and bequeathed all her real and personal estate over which she had any disposing power to her executors therein named. She then gave several legacies, which did not exhaust the fund, and appointed executors. She died in her husband's lifetime:—

Held, that the fund was, by the appointment, all converted into the wife's general personal estate, and hence that the unexhausted portion belonged to the husband, and not to the persons entitled in default of appointment under the settlement.

FURTHER consideration.

By an indenture dated the 19th of May, 1823, and made prior to the marriage of the Ven. *Richard Davies*, Archdeacon of *Brecon*, and *Eleonora* his wife, *Eleonora Davies* covenanted with the trustees that she would, within six months after the marriage, transfer or procure to be transferred to the trustees certain specific funds, and a share of funds, to which she was entitled in possession and reversion, to hold the same upon trust for *Richard Davies* for life, and then for *Eleonora Davies* for life, and from and after the decease of the survivor upon trust to assign and transfer the same funds as *Eleonora Davies* should, notwithstanding coverture, by deed or will appoint; "and in default thereof, and in case any such shall be made, then as the estates or interests therein directed or appointed shall end and determine, and as to so much of the trust moneys, stocks, funds, and securities, of which no such direction or appointment shall be made," in trust for all and every the child and children of the marriage; "and for and in default of issue of the said intended marriage, or in case there shall be issue, and all of them shall die without leaving issue in the lifetime of the survivor of them the said *Richard Davies* and *Eleonora Davies*, then in trust for such person or persons as at the time of the decease of such survivor of them the said *Richard Davies* and *Eleonora Davies* shall be the next of kin of the said *Eleonora Davies* under and according to the Statute of Distributions of the estates of persons dying intestate."

By an indenture dated the 9th of November, 1852, certain tithes were demised by Archdeacon *Davies* to *Henry Maybery*, his executors, administrators, and assigns, for a term of twenty-one years from the date of the deed, at a yearly rent of £20; and by another indenture, dated the 13th of November, 1852, it was declared that *Henry Maybery* did and should stand possessed of the same tithes upon trust for the separate use of *Eleonora Davies* for her life; and after her decease upon trust to assign and transfer the same as she, notwithstanding coverture, should by deed or will appoint; "and for want of such direction and appointment, and until such direction or appointment shall take effect, and from time to time subject to such direction and appointment as shall have been made, to stand possessed of the said tithes, tithe-rent-charges, and hereditaments, so demised as aforesaid, for the then residue of the said term of twenty-one years therein, subject as aforesaid, and the accumulations, if any, of the annual income thereof, in trust for the person or persons who at the decease of the said *Eleonora Davies* shall be of her blood and in kin to her, and who, either in right of himself, herself, or themselves, or of his, her, or their representation, would be entitled to the same under the statutes for the distribution of the effects of intestates in case the said *Eleonora Davies* had died intestate, and without having been married; and if there shall be more than one such person, then to be divided between them in such proportions as they would be entitled to the same under those statutes."

By an indenture of mortgage dated the 20th of June, 1853, *Eleonora Davies*, in exercise of the power given to her by the deed of the 13th of November, 1852, appointed that from and after her death, *Henry Maybery*, his executors and administrators, should assign and transfer the tithes to *Elizabeth Brickenden*, her executors, administrators and assigns, for all the then residue of the term of twenty-one years, to secure the repayment of £500 and interest.

Eleonora Davies died on the 29th of April, 1855, leaving her husband surviving, and having made a will, dated the 27th of April, 1855, which, so far as it is material, was as follows:—

"This is the last will and testament of me, *Eleonora*, the wife of the Ven. Archdeacon *Davies*, Archdeacon of *Brecon*, made in pursuance of all powers enabling me in this behalf. I devise and bequeath all the estate, both real and personal, over which I have any disposing power, to my executors hereinafter named, their heirs, executors, administrators, and assigns, upon trust to pay to *Frederick Watkins* of *Brecon*, out of such part of my property as consists of tithes, the sum of £100 a year clear of all deductions; and also upon trust to allow my said husband during his life to receive the annual produce of my personal estate, and also the remainder of such part of my property as consists of tithes, after payment of the said sum of £100 a year to the said *Frederick Watkins*. I direct my executors to allow my personal property to remain upon its present investment during the life of my said husband, and after his decease I direct them to call in and convert the same, and thereout to pay the following legacies." Testatrix then gave five legacies of £300, £1000, £1000, £100, and £100; and appointed *Richard Thomas William Lambert Brickenden* and *Arthur Armitage* executors of her will; and directed them to retain the sum of £100 for their trouble in executing one of the legacies. The will contained no mention of debts.

There was never any issue of the marriage.

Archdeacon *Davies* died on the 14th of May, 1859.

This bill was filed in March, 1862, by Mrs. *Davies*' executors, *Brickenden* and *Armitage*, stating that the mortgage had been satisfied, that they had received certain moneys under the marriage settlement, and had contracted to sell the tithes; and that out of the moneys so received they had paid or provided for the sums mentioned in Mrs. *Davies*' will, and that a residue of £700 and upwards remained in their hands; and this sum being claimed, on the one hand, by the Very Rev. *Thomas Williams*, Dean of *Llandaff*, the executor of Archdeacon *Davies*, and, on the other hand, by the next of kin of Mrs. *Davies*, Plaintiffs prayed that the rights of the parties in respect of the residue might be ascertained and declared.

On the 19th of April, 1862, a decree was made directing accounts and inquiries; and it was found that there was no debt of Mrs. *Davies* remaining unpaid, and that her funeral expenses had been paid by her late husband.

Mr. *Everitt*, for the Plaintiffs.

Mr. *Druce*, Q.C., and Mr. *Freeling*, for the Defendant, the executor of the husband:—

Under the old law, executors under a bequest in these terms would have taken beneficially; now, under the provisions of the 11 Geo. 4 & 1 Will. 4, c. 40, residue not expressly disposed of is held by executors as trustees for the next of kin.

Even before this statute, where the residue was bequeathed to an executor upon trusts which did not exhaust the property, he was held to be a trustee of the unexhausted portion for the next of kin (*i.e.*, as against himself): *Dawson* v. *Clark* (1); *King* v. *Denison* (2).

The question here is, whether this doctrine is equally applicable where the gifts which do not exhaust the fund are by way of appointment, and there is a gift over in default of appointment. We maintain that it does equally apply—the principle being, that an appointor who shews an intention to exercise the power over the whole subject matter of the power, has converted the whole subject matter into his own personal estate: *Jarman* on Wills (3), citing *Lefevre* v. *Freeland* (4), and *Chamberlain* v. *Hutchinson* (5). In this instance, of course, whatever may fall into Mrs. *Davies*' general estate will pass to her husband.

That a general devise of real estate by a married woman possessed, in the event of her surviving *A.*, of a testamentary power of appointment over realty, will, if she survives *A.*, operate as a valid exercise of the power, though the will was made in *A.*'s lifetime, appears, if necessary, from *Thomas* v. *Jones* (6).

Mr. *Hardy*, Q.C., and Mr. *Higgins*, for Defendants representing

(1) 15 Ves. 409; 18 Ves. 247.
(2) 1 V. & B. 260.
(3) 3rd Ed. vol. i. p. 651.
(4) 24 Beav. 403.
(5) 22 Ibid. 444.
(6) 1 D. J. & S. 63. 9 Jur N.S. 61

respectively the next of kin of Mrs. *Davies* at her death, and her next of kin at the death of her husband:—

It would be impossible for these executors ever to say they are to take beneficially, because in the clause appointing them there is an express trust. The statute, therefore, is out of the question.

There is no doubt, on the authorities, that a man who, having a general power of appointment, exercises it in favour of volunteers, makes the fund liable to the payment of his debts. But it is equally clear that a married woman who exercises a general power of appointment by deed or will does not make the appointed fund liable to her debts. In other words, she does not convert the property into separate estate: *Vaughan* v. *Vanderstegen* (1); *Hobday* v. *Peters* (2); *Shattock* v. *Shattock* (3); *Matthewman's Case* (4). How, then, can it be said that this lady has made the unexhausted portion of the fund part of her general personal estate?

The true construction is, that the unexhausted portion of the fund is unappointed, and goes, under the settlement, to the persons who take in default of appointment: *Easum* v. *Appleford* (5).

In *Chamberlain* v. *Hutchinson* (6) the question was as to an appointment which failed by lapse; here we have to deal with a fund which has been appointed, but not given; or, as we say, which has been unappointed.

The *primâ facie* presumption that a gift to executors is to operate in favour of next of kin may be rebutted by circumstances.

Mr. *Bevir*, for others of the next of kin of Mrs. *Davies* at the death of her husband:—

Lord *St. Leonards* says: "Where there is a power to appoint part of a settled fund, the execution of the power takes the part appointed entirely out of the settlement. Although, therefore, the beneficial interest in it is not in terms immediately disposed of, yet there can be no resulting trust for the benefit of any person under the deed creating the power; for where the principal of the

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(1) 2 Drew. 165, 363, 408.

(2) 28 Beav. 354. 6 Jur. N.S. 794

(3) Law Rep. 2 Eq. 182 (3)

(4) Ibid. 3 Eq. 781. 12 Jur. N.S. 982

(5) 5 My. & Cr. 56; [and see further, *Hoare* v. *Osborne*, 33 L. J. (Ch.) 586; 10 Jur. (N.S.) 694; 12 W. R. 661; 10 L. T. (N.S.) 358.]

(6) 22 Beav. 444.

(3) 35 Beav. 489: 12 Jur. N.S. 405.

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fund is appointed, it must be considered as if it had never been comprised in the trust, because it is absolutely taken out of it by the execution of the power:" *Sugden* on Powers (1). But this *dictum* has been questioned by another writer, *Chance* on Powers (2), citing *Mansell* v. *Price* (3).

Mr. *Gardiner*, for another party in the same interest:—

The concluding words of the power shew a clear intention that in default of appointment the husband should be excluded.

Mr. *Druce*, in reply.

SIR W. M. JAMES, V.C.:—

I am of opinion in this case that the residue of the fund, after providing for the specific bequests, becomes the personal estate of the wife.

The only authority which appeared to me to raise any question on the matter is the case of *Easum* v. *Appleford* (4), which is not quite consistent with the *dictum* of Lord *St. Leonards* which has been referred to, nor with the case of *Chamberlain* v. *Hutchinson* (5) at the Rolls, as I understand it. In *Easum* v. *Appleford* there was a gift by will out of the fund, subject to the power of appointment, to two trustees, and they were directed to hold the fund upon trust, as to part thereof, for a lady who had died in the lifetime of the appointor, and whose interest therefore lapsed by her death; and in that case the Vice-Chancellor, who was afterwards confirmed by the Lord Chancellor, held that the property (about £2700) so given out of the fund to the person who died, did not go by way of resulting trust, as part of the personal estate of the appointor, but went back to the persons who were entitled under the original settlement. So that it was held there that in some particular cases there may be a resulting trust in favour of the objects of the original settlement. But the Lord Chancellor, having drawn the distinction between power and property, ends it all by saying (6): "No doubt she might have made these funds part of her general

9 Eq 428

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(1) 8th Ed. p. 467.
(2) Vol. ii. p. 483.
(3) Sugd. on Powers, App. p. 943.
(4) 5 My. & Cr. 56.
(5) 22 Beav. 444.
(6) 5 My. & Cr. 60.

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estate, but it is clear that she never intended so to do." That is the conclusion at which Lord Chancellor *Cottenham* arrived upon the construction of that will.

Upon this particular instrument I think the testatrix did intend to make the fund part of her general estate; because she not only gives it to the executors, which is, I think, almost conclusive on that point, but, having given it to the executors, she proceeds afterwards to speak of it as "my property." She says, "out of such part of my property as consists of tithes the sum of £100 a year clear of all deductions;" and then, "I direct my executors to allow my personal property to remain upon its present investment during the life of my said husband, and after his decease I direct them to call in and convert the same, and thereout to pay the following legacies," treating everything over which she had any power of testamentary appointment, and which would have included any savings of her separate estate, as one mass, giving it as one mass to her executors as executors, and constituting it one property, to be dealt with as her will directs.

It appears to me, therefore, clear that she did make it part of her personal estate. And the executors must hold it exactly as they hold any other part of her personal estate, upon trust, in this particular case, for the husband.

The declaration will be that the Defendant *Williams* is entitled as personal representative of the husband; the costs of all parties to be taxed as between solicitor and client, and paid out of the fund.

Solicitors for Plaintiffs and some Defendants: Messrs. *Clark & Pope.*

Solicitors for other Defendants: Messrs. *Parker, Rooke, & Parkers.*

Solicitors for other parties: Messrs. *Peacock & Goddard;* Messrs. *Swann & Co.*

WARE *v.* GARDNER.

V.-C. J.
1869
Feb. 10.

LR 14 Eq 113, 5

Fraudulent Conveyance—13 Eliz. c. 5—Subsequent Creditors.

A trader, by a post-nuptial settlement, settled all his property of every description, both present and future, upon trust for his wife for her separate use for life, remainder for himself for life, remainder for his children, reserving the control of his stock in trade to himself. Five years later he became bankrupt:—

Held, at the suit of his assignees, that the settlement was void under 13 Eliz. c. 5, although it did not appear that *A.* was indebted at the time of its execution, except on mortgages of part of the settled property, which had since been satisfied.

BILL by the creditors' assignees of the late *Richard Gardner*, a bankrupt, to set aside as fraudulent and void as against Plaintiffs and the other creditors of *Gardner* a voluntary post-nuptial settlement executed by him on the 13th of March, 1861.

Gardner carried on business as a builder at *Exeter*, and until within six or seven years of his death his business was small, but about that time he commenced taking larger contracts and entered upon more speculative undertakings. By an indenture dated the 13th of March, 1861, after reciting that he (*Gardner*) was desirous of settling in manner thereinafter mentioned the various particulars included in the schedule, it was witnessed that in pursuance of the said desire, and in consideration of natural love and affection for his wife and children, *Gardner* granted and assigned unto *Walter Hookway* all and singular the several messuages or dwelling-houses, hereditaments, goods, chattels, moneys, policies, and effects enumerated in the schedule, and all estate, right, and interest whatsoever of the said *Richard Gardner*, upon trust to pay the annual income to *Charlotte Gardner* (his wife) during her life, for her sole and separate use, free from the debts, control, and interference of the said *Richard Gardner*, with remainder to *Richard Gardner* during his life, and from the death of the survivor upon trusts for the benefit of the children and more remote issue of *Richard* and *Charlotte Gardner.*

The schedule to this settlement comprised seven freehold houses, subject to a mortgage in favour of the *Provident Permanent Build-*

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ing Society, "and all other the freehold, leasehold, or other hereditaments now or hereafter to belong to, or be bought, or otherwise acquired by the above-named *Richard Gardner*, all the stock in trade, implements, utensils, customers, credits or book-debts, and ready money, or other personal property of or belonging to, and hereafter to be acquired or belong to him in his trade of builder, but which the trustee or trustees for the time being under the above-written indenture is or are to suffer to remain under the control of the said *Richard Gardner* during his life." The schedule also included two policies, which were thenceforth to be kept on foot by and at the expense of *Gardner*. This deed was not registered as a bill of sale under 17 & 18 Vict. c. 36.

In January, 1866, the several properties enumerated in the schedule of the deed of 1861 were assigned to *Charles Lowe*, who had redeemed the mortgage in favour of the building society, and made a further advance to *Gardner*.

In 1865 *Gardner* purchased a piece of freehold land in *Exeter*, on which he erected two houses. In August, 1865, he mortgaged this property to *Lowe*, and in June, 1866, contracted to sell it to one *Edwards* (which sale had since been carried out by the Plaintiffs).

On the 18th of August, 1866, *Gardner* was adjudicated bankrupt on his own petition, and the Plaintiffs were appointed creditors' assignees of his estate and effects.

On the 3rd of September, 1866, *Gardner* died, and on the following day the Plaintiffs were served on behalf of the widow and children with notice of the settlement, and interdicting any interference with or attempted sale of the lands, houses, household goods, furniture, building materials, and stock in trade, book-debts and effects comprised therein.

Under these circumstances the bill was filed by the assignees against the widow and children, alleging that *Gardner* was indebted to divers persons at the date of the settlement, and contemplated becoming indebted to a much larger amount thereafter, and that the settlement of March, 1861, was executed with a view to defeat and delay his creditors; that, in addition to the amounts owing to his secured creditors, debts amounting to £992 had been proved against his estate by unsecured creditors; but that the whole of his estate and effects, after satisfying the remaining charges thereon, would be insufficient to pay and satisfy the debts of such unsecured creditors. The bill accordingly prayed that the voluntary settlement of March, 1861, might be set aside as fraudulent and void against the Plaintiffs and the other creditors of *Gardner*. *Hookway*, the trustee named in the settlement, had, before bill filed, disclaimed all interest under it.

By the answer, Mrs. *Gardner* raised the case (which was not insisted upon at the hearing) that the settlement of March, 1861, was not voluntary but for valuable consideration.

The answer stated the belief of the Defendants that at the date of the settlement *Gardner* was not indebted to any person otherwise than on the security of the mortgages, and that when he executed the settlement he did not contemplate becoming indebted, and did not execute it with a view to defeat or delay his creditors.

On behalf of the Plaintiffs the Plaintiff *Abell* stated his belief that *Gardner* was indebted in March, 1861, to divers other persons besides the mortgagees, and that such indebtedness went on increasing up to the time of his bankruptcy, and although contracted on a three months' credit, and paid shortly after the date of the settlement, further debts were contracted before payment, and so on from time to time, and that there never was a time after the settlement when the settlor was not indebted to a larger amount than he was able to pay. Before the date of the settlement the settlor applied to Plaintiff for timber on credit, but he declined, believing that settlor was not in such circumstances as to justify him in giving credit.

For the Defendants, on the other hand, a Mr. *Wills*, for whom the settlor had worked at different times since 1856, said that the business of the settlor was one in which only small contracts, paid for within a month, were undertaken; that he had had frequent dealings with settlor and always received his money within a month, and that he had no doubt that the settlor was quite solvent in March, 1861. The Defendant, Mrs. *Gardner*, was "quite sure that he was solvent in March, 1861, and that he was not then, or at any time till just before his bankruptcy, in any pecuniary difficulty whatever."

William Gardner, one of the sons, stated that he was in the

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habit of keeping his father's business accounts, and never knew him unable to meet his engagements, that he frequently paid debts before the credit had expired, and that at no time before 1865 was he indebted collectively beyond £50, and (as witness believed) was never without £50 in the house for his immediate wants.

The claim of the Defendants was limited to the freehold and leasehold houses, and to the policies of assurance (which were for small amounts only).

Mr. *Druce*, Q.C., and Mr. *W. Morris*, for the Plaintiffs:—

The deed of 1861, by which the settlor, who was in trade, denuded himself of every scrap of property present and future, was clearly devised and contrived "to the end, purpose, and intent to delay, hinder, or defraud creditors," within the meaning of the statute 13 Eliz. c. 5, and is therefore void as against the Plaintiffs: *Holmes* v. *Penney* (1); *Barrack* v. *M'Culloch* (2); *Warden* v. *Jones* (3).

Mr. *Kay*, Q.C., and Mr. *W. W. Karslake*, for the widow and children of the settlor: —

In order to set aside a post-nuptial settlement at the suit of subsequent creditors, whose debts were not contracted at the date of the settlement, it must be shewn that the settlor made it with express intent to delay, hinder, or defraud creditors, or that he was indebted at the time to the extent of insolvency: *Lush* v. *Wilkinson* (4); *Stephens* v. *Olive* (5); *Lord Townshend* v. *Windham* (6); *Skarf* v. *Soulby* (7); *Spirett* v. *Willows* (8), where Lord *Westbury* points out the distinction between the nature of proof required where the deed is impeached by creditors whose debts existed at the date of it, and where it is impeached by subsequent creditors. The words of the statute point to a *mens rea*, or present intent, to defeat existing creditors, and it is not sufficient to shew a mere implied intent to defeat future creditors, where no unsecured creditors were in existence at the date of the settlement. When this settlement was executed *Gardner* was perfectly solvent, and, beyond the common bills for which every man must be indebted, and which he had cash to meet: *Lush* v. *Wilkinson* (1). He had no creditors but his mortgagees, whose debts were secured, and unaffected by this deed. Under these circumstances the settlement in favour of the Defendants is not within the statute 13 Eliz. c. 5.

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(1) 3 K. & J. 90. 3 Jur NS 580
(2) Ibid. 110. 3 Jur NS 180
(3) 2 De G. & J. 76. 4 Jur NS 269
(4) 5 Ves. 384.
(5) 2 Bro. C. C. 91.
(6) 2 Ves. Sen. 1, 10.
(7) 1 Mac. & G. 364.
(8) 3 D. J. & S. 293. 11 Jur NS 7

[They also cited *Jenkyn* v. *Vaughan* (2); *Barling* v. *Bishopp* (3).]

SIR W. M. JAMES, V.C.:—

In 1861, *Richard Gardner* was carrying on the trade of a builder in the city of *Exeter*. Being such trader, and minded to continue to carry on his business and incur such debts as are incurred in the ordinary course of trade, he, on the 13th of March, 1861, assigned the property and effects comprised in the schedule of the deed to *Walter Hookway*, upon trust to pay the annual income to his wife for her life, for her separate use, free from the debts control, and interference of the settlor, with remainder to the settlor during his life, and from the death of the survivor upon trusts for the benefit of the children. The schedule to this deed included all property, as well future as present, of the settlor. He continued to trade, and became bankrupt in August, 1866. The question is whether by this deed he could have had any other intent than to delay and hinder his creditors? I am clearly of opinion that he did execute it with that intent, and that this post-nuptial settlement is within the very words of the statute of 13 Eliz. c. 5. The Plaintiffs are therefore entitled to a declaration in the terms of the prayer, and a decree to that effect, with a declaration that all persons claiming an interest thereunder ought to convey and assign the premises therein comprised to the Plaintiffs as assignees of *Richard Gardner*. Defendants must pay the costs of the suit.

Solicitors: Messrs. *Makinson & Carpenter*, agents for Mr. *Merlin Fryer, Exeter*; Mr. *William Moon*, agent for Mr. *R. T. Campion Exeter*.

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(1) 5 Ves. 384.
(2) 3 Drew. 419. 2 Jur N S 109
(3) 29 Beav. 417. 6 Jur N S 812.

V.-C. J.
1869
Jan. 30.

In re CRANE'S ESTATE.

Practice—Lands Clauses Act, ss. 70, 74—*Tenant for Life and Remainderman—Costs of Remainderman's Appearance.*

Where purchase-money has been paid in under the *Lands Clauses Act*, in respect of lands let on lease at rack-rent, and settled to the use of a tenant for life, with remainder over, it is proper to make the remainderman a Respondent to a Petition by the tenant for life for investment and payment of dividends, although the interest of the proposed investment of the money will be less than the rent reserved by the lease.

PETITION by a husband and wife and their trustee, for investment and payment of dividends to the separate use of the wife for life, of a sum of cash paid into Court by a railway company as the purchase-money of houses, let on lease at a rack-rent, and which were settled to the separate use of the wife for life, with remainder over.

It appeared that the annual income of the proposed investment would not amount to so much as the yearly rent of the houses purchased.

The remainderman had been made a Respondent to the Petition; and the only question was as to the costs of his appearance.

Mr. *Maidlow*, for the Petitioners.

Mr. *Streeten*, for the company, objected to pay the costs of appearance of the remainderman, which he said was unnecessary. In this case there could be no question between the tenant for life and remainderman, such as arose in *In re Mette's Estate* (1).

Mr. *Maidlow* submitted that as the application was under the 74th section of the Lands Clauses Act, it was proper to make the remainderman a Respondent.

Mr. *Kaye*, for the remainderman.

The VICE-CHANCELLOR held that the remainderman was a "party interested" within the 74th section, and made the order as prayed; the costs of appearance of the remainderman to be paid by the company.

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(1) Law Rep. 7 Eq. 72.

Solicitors: Mr. *John Clutton;* Messrs. *Baxter, Rose, Norton, & Co.*

In re LITTLE.

V.-C. J.
1869
Jan. 30.

Practice—Trustee Act, 1850—*Appointment of new Trustees—Infant Heir of former Trustee—Service.*

Service of a Petition for vesting in newly-appointed trustees lands which had descended to the infant heir of the former sole trustee upon the guardian of the infant heir is not necessary.

THIS was a Petition by a married woman, by her next friend, praying for an order vesting in new trustees real estate which had been settled upon trust, upon written application of the party entitled to the beneficial interest for the time being, to sell; and in the meantime to stand possessed of the real estate in trust to pay the rents and profits to the wife for her separate use, with remainder over.

The sole original trustee of the settlement had died intestate as to trust estates, leaving two infant co-heirs, to whom the estate had descended, and the wife had duly appointed the new trustees under a power in the deed.

The only question was, whether it was necessary to serve the Petition on the guardian of the infants.

Mr. *Nalder*, for the Petitioner, referred to *In re Tweedy* (1), *In re Willan* (2), and *In re Wise* (3), and submitted that service on the guardian was unnecessary.

Mr. *Badnall,* for the husband.

The VICE-CHANCELLOR thought that service on the guardian of the infants was unnecessary, and made the order as prayed.

Solicitors: Messrs. *Sole, Turner, & Turner,* for Messrs. *Burton & Sons, Lincoln.*

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(1) 9 W. R. 398. (2) 9 W. R. 689. (3) 5 De G. & Sm. 415.

M. R.
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Jan. 11, 12, 15.

SWENY *v.* SMITH.

Company—Forfeiture of Shares—Cancellation of Forfeiture—Bill by Shareholder on behalf of himself and all other Shareholders—Tender under Protest—Pleading—Separate Answers.

A shareholder in a company may file a bill on behalf of himself and all other shareholders to annul the forfeiture of his shares.

A shareholder in a company formed for working certain patents owed £40 to the company in respect of calls on his shares. He sent a cheque for that amount to the secretary, along with a letter, which began thus:—" Herewith I forward a cheque for £40, being the amount of the call made upon me for twenty shares which I hold in the company." Then followed a protest against the payment, on the ground, amongst others, that certain patents which had been sold to the company were invalid; and the letter concluded in these terms:—" I request that you will enter this my protest in the records of the company, and further, that this money be held in trust by the directors (each of whom I shall hold responsible for repayment of the same) until the question of the vendors' patent rights has been settled" :—

Held, that this was a good tender of payment; and that the concluding words of the letter imposed no obligation or liability on the directors.

THIS suit was instituted by the Plaintiff on behalf of himself and all other shareholders of *Spence's Patent Non-conducting Composition and Cement Company, Limited*, except the Defendants, with the twofold object of procuring the cancellation of an alleged forfeiture of the Plaintiff's shares, and of setting aside two purchases of patents by the company, on the ground of the invalidity thereof.

The first of the patents in question, which was for improvements in non-conducting compositions for preventing the radiation on transmission of heat or cold, and in coating metallic and other substances therewith, bore date the 22nd of October, 1862, and was granted to *James Spence*. By an indenture dated the 1st of July, 1863, *Spence* assigned to *Charles William Smith* all his interest in this patent in consideration of a royalty thereby reserved; and by an indenture dated the following 9th of July, *Smith* granted to *Henry Benson James* an exclusive license for working the patent. *James* put the patent into operation and carried on the manufacture of the patent composition on certain premises leased by him.

In September, 1863, *Spence* took out the second of the patents in question, which was for an improved plastic composition applicable to the coating of metallic and other surfaces. By an indenture dated the 20th of November, 1863, he assigned this patent to *Smith* and *John Clowes Bayley*, in consideration of a royalty thereby reserved.

In August, 1865, the above-named company was formed for the purpose of working the patents. The articles of association authorized the purchase from *Smith*, *James*, and *Bayley*, of their respective interests in the patents, and also the purchase from *James* of his business premises, plant, stock-in-trade, and goodwill; and the carrying into effect of certain agreements which had previously to the incorporation of the company been entered into with respect to these purchases. *Bayley* was nominated one of the first directors; and *James* and *Smith* were to be the managing directors.

The proposed purchase of the patents and business was duly confirmed by the company, and ordered to be carried into effect. The consideration agreed to be given to *Smith* for his interest in the patents was £5000 in fully paid-up shares, and £3000 in cash; and the consideration agreed to be given to *James* for the goodwill of his business was £2500 in fully paid-up shares, and £1500 in cash; and the stock-in-trade and plant was to be paid for at a valuation. Shares to the above-mentioned amounts were allotted to *Smith* and *James* respectively, and part of the cash was paid to them; and bills accepted by the company were given to *Smith* for the unpaid portion of the purchase-money due to him. No assignment of the patents had been executed; but the company had taken possession of *James*' business premises, stock-in-trade, and plant, and had carried on business there.

In February, 1867, the auditors of the company made a very unfavourable report as to the state of its affairs; and the directors declined to circulate the report amongst the company.

Shortly afterwards the Plaintiff discovered that in 1856 a patent had been taken out by one *Mennon* for a composition nearly identical with that invented by *Spence;* and upon laying a case before counsel, was advised that *Spence's* patent was invalid.

On the 14th of February, 1867, the directors made a call of £2 per share, payable on the 19th of March; but the time for paying the same was afterwards extended to the 10th of April.

On the 30th of March, 1867, the Plaintiff and certain other shareholders of the company signed a requisition to the chairman to summon an extraordinary general meeting to consider the question of winding up the company, on the ground that the objects for which the company was established had failed by reason of the invalidity of the patents.

On the 3rd of April, the directors gave notice to the Plaintiff that unless the call was paid on the 10th of that month his shares would be forfeited.

On the 10th of April the Plaintiff sent to the secretary a cheque for the amount of the call, along with a letter, which began thus:—"Herewith I forward a cheque for £40, being the amount of the call made upon me for twenty shares which I hold in the company;" then followed a protest against payment of the call on the ground, amongst others, that *Spence's* patents were invalid; and the letter concluded as follows: "I request that you will enter this my protest in the records of the company, and further, that this money be held in trust by the directors (each of whom I shall hold responsible for repayment of the same) until the question of the vendors' patent rights has been settled." On the next day the secretary returned the cheque to the Plaintiff, stating that the directors declined to receive it under the conditions contained in the letter of the 10th of April; and on the same day the Plaintiff's shares were forfeited, as were also the shares of two other shareholders, who entertained similar views to those of the Plaintiff.

On the 15th of April the bill in this suit was filed against the directors of the company (including *Smith, James,* and *Bayley*), and the company itself. It alleged that the Defendants other than the company knew of the existence of *Mennon's* patent at the date of the formation of the company; and prayed that the contracts for the purchase of *Spence's* patents might be set aside; that the vendors might be decreed to refund to the company the purchase-money paid, and to deliver up the shares allotted to them in consideration of the patents; that the company might be restrained from paying any further portion of the purchase-money or allotting any further shares to the vendors; that the forfeiture of the shares of the Plaintiff and all persons in a similar position with him might be declared void and cancelled; and that the directors might be restrained from enforcing such forfeiture.

A general meeting of the company had been fixed for the 17th of April; and on the 9th of April the Plaintiff gave notice to the secretary of his intention to move a resolution that the company should be wound up; and he desired that this resolution should be circulated amongst the shareholders previously to the meeting, in accordance with the articles of association. With this request the directors did not comply.

The general meeting was held on the 17th. The Plaintiff was admitted under protest, and was permitted to move his resolution, which was negatived.

In June, 1867, separate answers were filed by *Smith, James,* and *Bayley,* and also by the company and the remaining directors. These answers were, with the exception of one or two paragraphs, identical, and were signed by the same counsel, and filed by the same solicitors.

In the course of the same month, *Smith* offered to resign 210 of his fully paid-up shares, and also to deliver up four bills accepted by the company for sums amounting to £1435 12*s.* 6*d.* The reason alleged for his making this offer was, that at the time when the company was formed expectations were entertained that *Spence's* compositions would be largely used at the dockyards under the control of the Admiralty; but these expectations had not been realized. In July following *James* offered to resign 215 fully paid-up shares, and to release the company from payment of a sum of £1000 17*s.* 1*d.* due to him.

Both these offers were accepted; and upon this coming to the knowledge of the Plaintiff he proposed, by a letter of the 6th of January, 1868, to put an end to this suit upon the company paying his costs and reinstating the shareholders whose shares had been forfeited, on payment of arrears of calls due by them.

On the 20th of January, 1868, a resolution was passed at a general meeting of the company, that the members whose shares had been forfeited be reinstated on paying up the calls thereon in a month, and that the suit be compromised by each party paying his own costs, the shareholders voting in person or by proxy at the meeting binding themselves not to institute any suits or legal proceedings whatsoever in reference to the matters which are the subject of such suit; but this resolution was not to be acted upon or to

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be binding unless all the shareholders of the company gave their written assent thereto.

The Plaintiff objected to pay his own costs of the suit; and on the 23rd of January declined to accept the terms contained in the resolution.

The cause now came on to be heard. No evidence was given in support of the allegation that the Defendants other than the company were aware of the existence of *Mennon's* patent when the company was formed.

Spence, the patentee, had been made a Defendant by amendment.

Mr. *Southgate*, Q.C., and Mr. *Mackeson*, Q.C., for the Plaintiff:—

First: the shares were improperly forfeited. The tender made on the 10th of April was perfectly good, and the protest by which it was accompanied did not affect its validity: *Scott* v. *Uxbridge and Rickmansworth Railway Company* (1).

Secondly: with respect to the question of the validity of the contract it may be urged that this is a question for the shareholders to decide: *Foss* v. *Harbottle* (2). The Plaintiff is perfectly willing that the question should be so decided, but he is prevented from submitting it to a meeting by the forfeiture of his shares; and consequently he is entitled to file this bill: *East Pant Du Mining Company* v. *Merryweather* (3); *Atwool* v. *Merryweather* (4).

Mr. *De Gex*, Q.C., and Mr. *Bowring*, for *Smith*:—

The case of *Smith* differs from that of the other Defendants; he was therefore justified in putting in a separate answer.

The bill makes the Plaintiff sue in two characters, first, as against the company to be relieved from the forfeiture of his shares; secondly, as one of the company to set aside a contract which the majority of the shareholders do not wish to set aside. It is improper to combine two such objects in the same suit: *Thomas* v. *Hobler* (5).

At the time when the bill was filed the Plaintiff was not a share-

12 Jur. N.S. 602

(1) Law Rep. 1 C. P. 596.

(2) 2 Hare, 461.

(3) 2 H. & M. 254. 10 Jur. N.S. 1231

(4) Law Rep. 5 Eq. 464, n.

(5) 8 Jur. (N.S.) 125. 4 De G. F. & J. 199

holder. His shares had been legally forfeited; and no equitable ground is shewn for relief in this respect.

[LORD ROMILLY, M.R.:—The question is, whether the shares were legally forfeited. Ought you not to have taken the cheque?]

Mr. *De Gex*:—No. The cheque was accompanied by a letter requiring the directors to hold the money upon trust. This is, therefore, not a case of a simple tender under protest, which is perfectly good, but of a conditional tender, which is ineffectual: *Hough* v. *May* (1); *Marquis of Hastings* v. *Thorley* (2); *Bevans* v. *Rees* (3).

If he was a shareholder he has done nothing to avail himself of the domestic tribunal to which he was bound by contract to refer all these questions. *Atwool* v. *Merryweather* (4) is on this point a strong authority against the Plaintiff.

But supposing this difficulty got over, still he cannot be in a better position than the company would be if it were Plaintiff; for the allegations of fraud have not been proved. Now the company could not set aside the contract for the purchase of the patents for many reasons. All that they have purchased from *Smith* is his interest in the patent; and there was no warranty that the patent was a good one. Supposing *Spence's* patent to be bad, which we do not admit, still that would be no ground for rescinding the contract, nor would it even be a defence to a suit for specific performance: *Taylor* v. *Hare* (5); *Hall* v. *Conder* (6); *Smith* v. *Neale* (7).

Further, it is not proved that *Spence's* patent is bad. All that is shewn is that a person of the name of *Mennon* took out a similar patent in 1856, and therefore before *Spence's* patent. But that does not shew the patent to be bad. Witness the case of *Betts'* patent, which had been anticipated verbally by *Dobbs*: *Betts* v. *Menzies* (8).

Finally: If the sale is to be set aside the vendors must be reinstated in their former situation. Now before the sale *Smith* was

(1) 4 Ad. & E. 954.
(2) 8 C. & P. 573.
(3) 5 M. & W. 306.
(4) Law Rep. 5 Eq. 464, n.
(5) 1 B. & P. (N.R.) 260.
(6) 2 C.B. (N.S.) 22; 3 Jur. (N.S.) 366, 963.
(7) 3 Jur. (N.S.) 516.
(8) 10 H. L. C. 117.

assignee of the patent, and *James* was his licensee; how is the Court to restore them to these relative positions?

Mr. *Roxburgh*, Q.C., and Mr. *Rudall*, for *James*:—

The company have obtained possession of the business, plant, stock-in-trade, and goodwill of *James*; how is he to be restored to the position in which he was before the formation of the company?

The case of this Defendant differs from that of the others; and therefore he is entitled to answer separately.

Mr. *Jessel*, Q.C., and Mr. *Springall Thompson*, for *Bayley*:—

The allegations in the bill are not proved; and if they were they would be insufficient to entitle the Plaintiff to relief. All that is alleged is, that the vendors of the patents knew of something which might invalidate the patents. But the vendor of a patent is not bound to disclose to a purchaser things which might invalidate his patent; if he did do so, the purchaser would break off the sale on the ground that the patent was bad, and immediately proceed to use it. There is nothing approaching to fraud in this case; the transaction is one which the company had it in their power to confirm, and they have confirmed it. The bill ought, therefore, to be dismissed.

Mr. *Freeling*, for *Spence*.

Sir *R. Baggallay*, Q.C., and Mr. *Horton Smith*, for the company and the directors:—

The question as to the forfeiture of the Plaintiff's shares is entirely subsidiary to the question as to the sale of the patents. The Plaintiff's case as to the latter entirely fails; for fraud is out of the question; and be the patents good or bad, the company have only bought the interest of the vendors in them, for that interest they are bound to pay.

Mr. *Mackeson*, in reply:—

The main question is whether the forfeiture is good or bad. The Plaintiff is quite willing to submit the whole question as to the validity of the patents to the shareholders; but he has been prevented from doing so by the forfeiture. If the shares had not been forfeited this bill would never have been filed.

It is true that the Plaintiff was allowed to speak at the meeting of the 17th of April; but his resolution was not circulated amongst the shareholders, and cannot be said to have been fairly brought before them.

The validity of the forfeiture depends entirely on the question whether the tender was conditional, or simply under protest. A tender is invalid only when the party receiving the money is required to make some admission which would prejudice him, Here no admission of any sort was required.

Jan. 15. LORD ROMILLY, M.R., after stating the facts down to the time of the filing of the bill, continued :—

Two things, I think, are certain; that this suit was caused by the forfeiture of the shares: next, that the great object of the forfeiture was to get rid of the objections and trouble caused by the Plaintiff.

I think the forfeiture is bad. The tender of payment was good. The letter of the 10th of April was a mere protest and nothing else. The cheque is sent expressly in payment of the call. The trust mentioned in the letter amounts to nothing; the directors are necessarily trustees for some one. The Plaintiff does not say to the directors, you must set apart this money to abide the result of this particular question, and you must not apply it for any other purpose; on the contrary, he sends it in payment of the call. The cases cited are totally different; for example, where a sum was tendered as the rent due for a half-year, the person who took it must have admitted that the sum was the correct amount of rent. So where a cheque is drawn for the balance of an account. And if the Plaintiff had required the directors to set apart the money to indemnify him against the result of this suit, the tender would have been bad; it would not have been in payment of the call.

The effect of filing the bill was that *Smith* and *James* gave up £4000 of the purchase-money. Ostensibly this was done because the Admiralty did not employ the patent; but I suspect that the existence of the bill had somewhat to do with the matter. After this became known to the Plaintiff, he expressed himself satisfied, and wished to discontinue this suit; and correspondence took place with the view of effecting a compromise. [His Lordship then read the letters of the 6th and 23rd of January, and the resolution of the 20th.]

This compels me to consider whether the Plaintiff was or was not at that time entitled to the costs of this suit. So far as the suit relates to the forfeiture, I think he was; but as to the rest I think I should have made no decree.

The company was formed to carry on *Spence's* patent. It is alleged that this patent is bad; and that is a question to be determined by judicial decision; but unless it is admitted by the Defendants to be bad, I cannot in this suit go into the question of validity. I cannot say that the patent is bad on the face of it.

The Plaintiff might say: "If it is bad I will not be a member of the company, and I wish to give up my shares and to have repayment of what I have paid on them." But if the other members choose to go on with the business, although the patent is bad, they can do so, and the Plaintiff cannot undo the original agreement and dissolve the association, and require that it may be wound up against the disposition and wish of all the other members. I think the Plaintiff is put in this dilemma—either he must retire from the company altogether, or he must go on with it according to the wishes and votes of the majority. But the Plaintiff takes a totally different course, and seeks to remain a member and to regulate the proceedings contrary to the will of the company. If the case, therefore, had come before me at the time when this proposal was made, I have no doubt I should have given the Plaintiff a decree annulling the forfeiture of his shares, and dismissing the rest of the bill; and in that case I should probably have set off the costs of one part of the suit against the other. I think, therefore, that the offer made by the Defendants was a fair offer, and one that ought to have been accepted by the Plaintiff. The result is, that since that time he has been in the wrong.

It is necessary, however (as the matter is wholly opened by the refusal of the Plaintiff and the arguments of the Defendants), to consider the objections the Defendants make to the cancellation of

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the forfeiture. On the merits they have said little; indeed there is not much to be said. The cheque was clearly and expressly given for the calls, and though the Plaintiff requested the directors to hold it in trust, yet this request imposed no species of obligation on them as the condition of taking the money. But many technical reasons are alleged against it. In the first place, it is said that the forfeiture is good until it is set aside, and that the Plaintiff must have that done before he asks for the return of his shares, and that the bill does not pray for this, but merely a declaration that it is void. I think it is immaterial which he asks, cancellation or a declaration; in substance it is the same. It misleads no one; and if the Plaintiff cannot maintain this bill until the forfeiture is set aside, he can never set it aside; because the same objection must apply to any bill he could file. In my opinion, the objection is self-destructive.

Secondly, it is said that he sues on behalf of himself and the other shareholders; and that the forfeiture is a matter solely personal to himself. I think not. I think it is for the interest of all the shareholders that shares should not be improperly forfeited.

The third objection, that the suit is not in the name of the company, is a more serious objection, but it does not apply to the question of forfeiture; it applies to the other branch of relief which the bill seeks. Still, even as regards this, if the adoption of the trade and business of *Smith* and *James* was, in the event of the patent being bad, an act *ultrà vires* of the company, on the ground that it was established to conduct a real and valid patent, then a minority might institute proceedings to prevent their so acting.

I think, therefore, that the proposal made by the company in January, 1868, was right and ought to have been accepted. The refusal of the Plaintiff to accept the proposal opens the whole matter; but it is not desirable to go into it farther than I have done. The suit, in my opinion, was occasioned by the forfeiture. The rest of the suit is to set aside an agreement which the Plaintiff insists is *ultrà vires.* Certain material advantages were obtained by the suit for the benefit of the shareholders. Thereafter both sides wished to discontinue it. The Plaintiff asked for his costs; the Defendants offered to return the shares, and that each party should pay his own costs. I think this was the reasonable thing

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to be done at the time, and I will not disturb it. Since then the Plaintiff has been in the wrong and must pay the costs of all parties.

I do not enter into the case of individual shareholders and directors. I think they must be treated, and the proposal treated them, as, in fact, being the company, and that their defence ought to have been made at the same time and by the same answer as the company; and if I opened the matter before the proposal, and minutely dissected the separate rights of each Defendant, I should disallow, if I did not make them pay, the costs occasioned by filing separate answers exactly the same, or nearly so.

Solicitors for the Plaintiff: Messrs. *Jones & Blaxland.*

Solicitors for the Defendants: Messrs. *Powell, Thompson, & Groom.*

M. R.
1868
Nov. 24, 25.

LONDON, HAMBURGH, AND CONTINENTAL EXCHANGE BANK *v.* HENRY.

Company—Unauthorized Payment by Directors—Suit by Company to recover from Person who had received such Payment.

5 Ch 448, 450
17 Ch 280

The directors of a banking company, whose articles of association provided that the directors might, without any authority from the shareholders, "sell or dispose of any of the property of the company," paid out of the funds of the company £500 to *H.*, a stockbroker, being the amount of the premium on 1000 shares of the company purchased by him in the market, at the request of the directors, for *F.*, whom they had requested to join the board. The company was wound up, and a suit was instituted on its behalf by the official liquidator against *H.*, to which neither the directors nor *F.* were made parties, to recover from him the £500, on the ground that it was a breach of trust by the directors of which *H.* had notice:—

Held, that as the whole transaction could not now be annulled, nor the parties be replaced in their former position, such a suit could not be entertained.

THIS was a suit instituted by the official liquidator in the name of the *London, Hamburgh, and Continental Exchange Bank, Limited,* which was in course of liquidation, to recover from the Defendant, Mr. *Henry,* the sum of £500, alleged to have been improperly paid to him by the directors.

The bank was incorporated in 1862 under the *Companies Act.*

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The articles of association provided as follows: "The directors may, in the management of the business of the company, without any further power or authority from the shareholders, sell or otherwise dispose of any of the property of the company, and accept payment in satisfaction for any of the property so disposed of in shares, or partly in shares and partly in cash, or in such other manner as the directors may deem expedient."

In 1864 the directors were desirous of placing Mr. *Fletcher* on the board: he was willing to comply with their wish, but required that 1000 shares should first be transferred to him, which he agreed to take at par. The directors accordingly instructed *Henry*, who was a stockbroker, to procure the necessary number of shares, which could only be obtained in the market at a premium of 10*s.* per share. *Fletcher* declined to pay any premium, whereupon the directors paid £500 out of the funds of the company to *Henry* in satisfaction of the premium.

Fletcher subsequently declined to join the board, and sold the shares at a large premium, and *Henry* sued him for a return of the shares, but the action was compromised by the payment of a considerable sum to *Henry*.

In 1865 an order was made for winding up the company.

The bill alleged that the directors had no authority to expend the funds of the bank in paying to the Defendant any premium on the shares, and that the same was a breach of trust: it charged that the directors were in insolvent circumstances, and were unable to make good the £500, and prayed a declaration that the Defendant *Henry* might be declared liable to repay the amount.

Mr. *Roxburgh*, Q.C., and Mr. *Hastings*, for the Plaintiffs, contended that the transaction in question did not come within the terms of the articles of association, and was a breach of trust of which the Defendant was cognizant, and that he was therefore liable to refund the money he had received: *Bryson* v. *Warwick and Birmingham Canal Company* (1); *Ernest* v. *Croysdill* (2).

Mr. *Jessel*, Q.C., and Mr. *Haynes*, for the Defendant, contended that it was a payment *intrà vires;* but assuming that it was not,

(1) 4 D. M. & G. 711. 18 Jur 47

(2) 2 D. F. & J. 175. 6 Jur N S 740

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the Court could not now follow the money in the hands of the Defendant.

Mr. *Roxburgh*, in reply.

Nov. 25. LORD ROMILLY, M.R.:—

I am of opinion that the Plaintiff has no case at all. The general transaction was this:—[His Lordship then stated the facts of the case.]

The company now come forward, not for the purpose of annulling the transaction, which they cannot do, but for the purpose of picking out one particular item—the payment of £500 to *Henry*, which they seek to recover from him on the ground that the directors had no authority to pay him the money and that he was aware of the fact. The transaction, if impeached at all, must be annulled altogether. The parties cannot now be put back in the same position as before, and it is one of the fundamental principles of Equity that unless that can be done the Court cannot interfere at all. The case would have been different if there had been any taint of fraud, but of that there is no trace. Without entering into the question whether the company had authority to do what they did (though it is difficult to say that the articles of association do not, in terms at least, include the power), it is impossible that I can, after this lapse of time, set aside the transaction against the Defendant, when the directors and Mr. *Fletcher* are not parties to the suit. It is impossible that the Court can entertain a suit merely to recover from the Defendant the sum of £500 which he received for obtaining for the company certain shares which were handed over to Mr. *Fletcher*.

The bill must be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Deane & Chubb*.
Solicitors for the Defendants: Messrs. *Bothamleys & Freeman*.

In re DYKES' ESTATE.

M. R.
1869
March 8, 9.

Power to appoint by Deed—Contract of Sale to Railway Company—Defective Execution—Conversion.

Under a settlement certain lands stood limited to such uses as *D.* should by deed appoint, and subject thereto to the use of *D.* and the heirs of his body, with remainders over. *D.* was also absolutely entitled in fee to certain other lands. A railway company required part both of the settled estate and of the lands to which *D.* was absolutely entitled. By an agreement not under seal made between *D.* and two of the directors of the company, after reciting that *D.* was owner of certain lands part of which, being those specified in the schedule thereto, were required by the company, and that the purchase-money and compensation to be paid to *D.* in respect of the taking of such lands had not been ascertained, and that it had been agreed to refer these matters to arbitrators and an umpire therein named, the parties thereto bound themselves to abide by the determination of the arbitrators and umpire. The schedule comprised the lands required by the company, without any distinction as to the titles under which they were respectively held: and a single sum was awarded to *D.* as the purchase-money for the whole thereof. Before any conveyance was executed, *D.* died:—

Held, that the agreement operated in equity as an execution of the power of appointment in the settlement: and that the purchase-money was payable to the legal personal representative of *D.* as part of his personal estate.

IN and previously to November, 1862, certain lands and hereditaments in *Cumberland* stood limited under or by virtue of an indenture dated the 24th of March, 1844 (being the settlement made on the marriage of *Fretcheville Lawson Ballantine Dykes*), to the use of such person or persons, for such estates or interests, and in such manner as *Fretcheville Lawson Ballantine Dykes* should by deed, revocable or irrevocable, appoint, and in default of such appointment, to such uses and upon such trusts, intents, and purposes as he should by his will or codicil appoint in favour of some one or more of his children or other issue, in case he should have any child or issue living at his death, and in default of any child or issue then living, and in default of and until such appointment, to the use of the said *F. L. B. Dykes*, and the heirs of his body, with divers remainders over.

By an indenture dated the 20th of November, 1862, *F. L. B. Dykes*, by virtue of the power given to him by the said indenture

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of the 24th of March, 1844, appointed part of the lands and hereditaments therein comprised to *Joseph Ballantine Dykes* and *Lamplugh Brougham Ballantine Dykes* in fee, subject to a proviso for the redemption thereof on payment of £20,000 and interest, which principal sum and interest it was thereby declared were not to be considered as a debt due from *F. L. B. Dykes*, nor was he to be personally liable to pay the same. Messrs. *J. B. Dykes* and *L. B. B. Dykes* were, in fact, the trustees of a settlement, and this charge of £20,000 was given to them to secure the repayment of a like sum borrowed from them by *L. B. B. Dykes.*

In or about the beginning of 1866, the *Maryport and Carlisle Railway Company* required, for the construction of their line, part of the lands comprised in the indentures of the 24th of March, 1844, and the 20th of November, 1862, and also part of the lands comprised in the former but not in the latter indenture, and also certain lands to which *F. L. B. Dykes* was absolutely entitled in fee.

By an agreement, not under seal, dated the 26th of March, 1866, and made between *Fretcheville Lawson Ballantine Dykes* of the one part, and two of the directors of the said company, for and on behalf of that company, of the other part, after reciting that the said *F. L. B. Dykes* was the owner of certain lands and hereditaments, parts of which, being those referred to in the schedule thereunder written, were required by the said company, and that the amount of purchase-money and compensation to be paid to the said *F. L. B. Dykes* in respect of the taking the said lands and hereditaments so required as aforesaid, and of the severance thereof from his other lands and hereditaments, and the accommodation works to be provided for such last-mentioned lands by reason of the making of the said railway, had not been respectively adjusted and ascertained, and it had been agreed to refer all these matters to *William Dickinson*, nominated on the part of the said company, and *William Hodgson*, nominated on the part of the said *F. L. B. Dykes*, and to *Joseph Monkhouse Richardson*, who had been nominated the umpire of the said referees, to settle, fix, and determine, it was agreed by the said two directors, on behalf of the said company and the said *F. L. B. Dykes*, that the said company and the said *F. L. B. Dykes* would well and truly abide by the order and final determination of the said referees and umpire, or of any two of them, touching and concerning the matters aforesaid, so that their award and determination be made on or before the 1st day of May then next, or within such further time as the said referees and umpire, or any two of them, might appoint by indorsement in writing thereon.

The schedule contained a description of the lands required by the company, but did not distinguish the titles under which they were respectively held.

By the award of the arbitrators and umpire, dated the 26th of May, 1866, a lump sum of £2711 2*s.* 1*d.* was awarded to *F. L. B. Dykes* as the purchase-money for the lands taken by the company, and as compensation for severance, &c.

By his will, dated the 26th of November, 1866, *F. L. B. Dykes* appointed his wife executrix, and declared that he did not intend to exercise any of the general powers of appointment contained in his marriage settlement, or any settlement subsequent thereto; and, after a bequest of certain chattels, the testator gave all the lands sold to the *Maryport and Carlisle Railway Company* to his wife, her heirs and assigns, subject to the equities affecting the same; and he gave all his unsettled real estate, and all his personal estate, to his wife during her life, and after her death to such of his children and in such manner as she should by deed or will appoint. The testator died on the same day, leaving his eldest son, an infant, his heir at law and heir in tail under the settlement of 1844.

The railway company took possession of the lands comprised in the agreement, and, after the death of the testator, paid the purchase-money into Court, and a Petition was now presented by the widow of the testator, and the mortgagees under the deed of 1862, praying for a reference to Chambers to apportion the fund between them, and for payment out to them accordingly.

Mr. *H. M. Jackson*, for the Petitioners:—

The question on this Petition is, whether the lands subject to the settlement of 1844 are bound by the agreement of the 26th of March, 1866. If they are, the fund in Court will belong to the Petitioners, as the mortgagees under the deed of 1862, and

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the legal personal representative of *F. L. B. Dykes;* if they are not, the infant son of *F. L. B. Dykes* will be entitled to part of the fund, as heir in tail under the settlement.

It is admitted that the agreement in question, not being under seal, is not a legal execution of the general power of appointment contained in the settlement of 1844, but it is submitted that it is a defective execution which equity will carry into effect. A contract for valuable consideration is, in equity, considered a defective execution, and will be carried into effect, provided there is a sufficient indication of the intention to execute the power: *Sugden* on Powers (1). The question, therefore, is, has *F. L. B. Dykes,* in the agreement of the 26th of March, 1866, shewn sufficiently an intention to execute the power? Now, he describes himself as "owner" of all the lands comprised therein; he was absolute owner in fee of part; over the rest he had a general power of appointment, and, subject thereto, was entitled to them in tail. A simple conveyance of all the lands subject to the agreement would have been an effectual execution of the power, and the Court, seeing this, and seeing that *F. L. B. Dykes* speaks of himself as owner of all the lands, will not presume that he intended to contract as to part in his limited capacity of tenant in tail, but will presume that he intended to contract as having a general power of appointment.

Morgan v. *Milman* (2) will probably be cited on the other side. In that case, however, the power of appointment was vested in father and son jointly, and as between them no binding contract had been entered into. On this ground, therefore, the case may be distinguished.

Mr. *Fischer,* for the infant son of *F. L. B. Dykes:*—

I submit that there is no contract to exercise the power of appointment, and that the agreement of the 26th of March, 1866, was entered into by *F. L. B. Dykes* as tenant in tail of the settled estates; and, consequently, that such agreement is not binding on the infant tenant in tail, who can only be barred by a deed executed in accordance with the provisions of the *Fines and Recoveries Act.*

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(1) 8th Ed. p. 552.

(2) 3 D. M. & G. 24.

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It is to be borne in mind that this was not a voluntary, but a compulsory sale. The company had power to take the land; the only point to be decided was the price to be paid for it. Now that might have been determined in several ways—by the verdict of a jury, by arbitration, by the valuation of a surveyor appointed in manner provided by the *Lands Clauses Act*, or by *F. L. B. Dykes* himself, provided that the amount was not less than the sum determined by two able practical surveyors, nominated in manner mentioned in sect. 9 of the *Lands Clauses Act*. All that was done by the agreement of the 26th of March, 1866, was to decide that, there being power to have the price determined in these ways, it should be determined by arbitration. This was the view taken of a similar agreement in *Ex parte Walker* (1). The contract, therefore, is not a contract for sale of the land, but merely that the price should be determined by arbitration. Consequently there is no conversion, and so much of the fund as represents land comprised in the settlement of 1844, is subject to the trusts of that settlement, and is not subject to the testator's will: *Haynes* v. *Haynes* (2); *Re Arnold* (3).

Mr. *Droop*, for the company.

Mr. *Jackson*, in reply:—

The only question is, whether there is a contract to execute the power. The testator mixes up the settled and unsettled estates together; he deals with both as "owner" thereof; it is impossible to suppose that he regarded himself as merely a limited owner of the unsettled estates.

Mar. 9. LORD ROMILLY, M.R.:—

The question which arises on this petition is, whether in the events I am about to mention a Court of Equity will treat a contract entered into by the testator as an execution of a general power of appointment by deed.

The case may be stated shortly thus:—[His Lordship stated the facts.]

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(1) 1 Drew. 508. 17 Jur. 706

(2) 1 Dr. & Sm. 426. 7 Jur. N.S. 595

(3) 32 Beav. 591. 13 Jur. N.S. 156

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It was very properly admitted that the power has not been executed at law; and the question is, whether a Court of Equity will aid the execution.

The case was very well argued on both sides. On the one hand, it was said that a purchase by a railway company can hardly be called a voluntary contract, for the vendor has no option; he must sell, and the only thing left to him to decide is, the way in which the price is to be found. That may be by a jury, or by arbitration, in which cases the vendor has no voice in the matter; or the vendor may determine it himself, and enter into a contract, subject to the regulations contained in the *Lands Clauses Act.*

Now the principle upon which a Court of Equity proceeds is, that when a person enters into a contract for the execution of a power of appointment for valuable consideration, but does not carry it into effect and exercise the power, the Court will supply the defect. It is said that here the vendor has not entered into such a contract, but I think that is saying too much. The testator entered into a contract to do that which, if done, would be a good execution of the power. He contracted to sell at a price to be found by arbitration; the price has been found; and that constitutes a good contract, which could be enforced against him and his heirs and devisees. If he had carried this contract into effect, and executed a deed, there would have been a good execution of the power, and I am therefore of opinion that this is a case bound by the general rules of Equity with respect to the defective execution of powers.

The cases cited do not militate against this at all. In *Re Arnold* (1) there was no contract. Under the statute certain persons came and took the land, but there was no contract between them and the owner. Here the owner interposes and chooses to agree to do what, if done, would be a good execution of the power; and, therefore, I am of opinion that the fund is personal estate.

The order will be in accordance with the prayer of the Petition, but it may be prefaced with these words: "The Court being of opinion that the contract of the 26th of March, 1866,

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(1) 32 Beav. 591. 9 Jur NS 1186

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operates in Equity as an execution of the power of appointment in the indenture of settlement of the 22nd of March, 1844, order," &c.

Solicitors: Messrs. *Bischoff, Bompas, & Bischoff*; Messrs. *Gregory, Rowcliffes, & Rawle,* agents for Messrs. *Tyson & Hobson, Maryport.*

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[illegible] 542

Separation Deed.

By a deed, which recited that *B.* and his wife had agreed to live apart from each other during the remainder of their lives "upon the terms and conditions thereinafter contained," *B.* covenanted with trustees to allow his wife to live separate, and settled a sum of money upon trust for his wife for her life, and for their children after her death, with a proviso that if *B.* and his wife should afterwards agree by writing under their hands, attested by two witnesses, to cohabit together, the income of the trust fund should be paid to *B.* during such cohabitation, and the trustees covenanted to indemnify *B.* against his wife's acts and engagements.

No separation took place between *B.* and his wife:—

Held, that the deed was a separation deed, and not a voluntary settlement, and that as no separation took place, it was wholly void.

THIS was a suit for the administration of the estate of *George Bindley,* in which the only question was as to the validity of a settlement made by him in contemplation of a separation between him and his wife.

On the 27th of January, 1858, *G. Bindley* gave to *Thomas Jenkins* and *Edward Bindley* his promissory note for £3000, and an equitable mortgage of freehold property to secure the same sum, and also executed the deed of settlement in question.

By this deed, which was made between *G. Bindley* of the first part, *Elizabeth,* his wife, of the second part, and *Jenkins* and *E. Bindley,* "trustees named and appointed on the part of the said *Elizabeth Bindley* for the purposes hereinafter mentioned," of the third part, after reciting that *G. Bindley* and his wife had agreed to live apart from each other during the remainder of their lives "upon the terms and conditions hereinafter contained," and that

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he had secured the payment of £3000 to the trustees, and that it had been agreed that he should make such settlement upon his wife and her issue as thereinafter mentioned, *G. Bindley* covenanted with the trustees to allow his wife to live apart from him during their joint lives, and that she might keep and dispose of her property as a *feme sole*, and it was declared that the trustees should hold the £3000 upon trust to pay £300 to *Elizabeth Bindley* for her separate use, and to invest the remaining £2700, and pay the income to her for her life for her separate use, she thereout or otherwise maintaining all their children until certain ages, and after her death in trust for the children in equal shares. The deed contained a proviso that if at any time after its execution *George* and *Elizabeth Bindley* should mutually agree by writing under their hands, attested by two credible witnesses, to live and cohabit together, then and so long as they should cohabit together the payment of the income of the trust fund to *Elizabeth Bindley* should be suspended, and such income should be paid to *George Bindley* for his own use. And the deed contained covenants by the trustees with *G. Bindley* for indemnity against the acts and engagements of his wife.

The separation never took place, and Mr. and Mrs. *Bindley* continued to cohabit together until his death in May, 1868.

The suit was instituted by the two infant sons of Mr. and Mrs. *Bindley*, whose interest it was, as devisees and legatees under Mr. *Bindley's* will, to invalidate the settlement, against Mrs. *Bindley*, the only other child, a married daughter, of Mr. and Mrs. *Bindley*, and her husband, the trustees of the settlement, and the executors of Mr. *Bindley's* will.

Mrs. *Bindley*, in her answer, stated, that before and at the date of the settlement she had reason to fear that her husband might be induced to desert her and to alienate his property, and that to allay such fear her husband agreed to secure to her and her children a proper provision against any such desertion or alienation, and the settlement was made in pursuance of such agreement, and that she never had any desire to leave her husband, and upon being so provided for she continued to live with him, but with no intention of thereby forfeiting such provision to any greater extent than was expressly mentioned in the settlement.

Mr. *Jessel*, Q.C., and Mr. *A. E. Miller*, for the Plaintiffs:—

The settlement was made solely in contemplation of, and as part of the agreement for, the separation, and as the separation never took place, the whole of the settlement was null and void. The case is completely covered by the decision in *Westmeath* v. *Salisbury* (1), where a settlement on a wife and children upon an agreement for immediate separation was held to be void, on the ground that the husband and wife had continued to live together after the execution of the settlement. In this case they not only lived in the same house, but cohabited together, and the covenants by the trustees, which were omitted in the deed in *Westmeath* v. *Salisbury*, clearly prove that this was a separation deed, and not a voluntary settlement.

In *Webster* v. *Webster* (2) it was admitted that a return to cohabitation put an end to the separation deed; but there was a new contract by the husband at the renewal of cohabitation to continue the wife's annuity. In *Wilson* v. *Mushett* (3) there was an express proviso that subsequent cohabitation should not alter the trusts; and in *Randle* v. *Gould* (4) an express proviso that the deed should be void upon a return to cohabitation, according to stipulated formalities, shewing an intention that it should otherwise remain in force. Here the proviso is only to suspend the wife's interest during a subsequent cohabitation by agreement in writing; and, if it were necessary, we should contend that this proviso would avoid the deed, as contemplating a future separation. But in all the cases cited there was an actual immediate separation, and the only question was whether the trusts of the deed were subsequently determined. Here there was no separation, and the trusts never arose. The trusts for the children also fail, for the whole settlement was a single transaction, based upon the contemplated separation. [They also referred to *Wilson* v. *Wilson* (5).]

Mr. *Dewsnap*, for the executors and trustees.

Sir *R. Baggallay*, Q.C. (Mr. *G. N. Colt* with him), for Mrs. *Bindley*:—

The settlement, though expressed to be made upon an agree-

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(1) 5 Bli. (N.S.) 339.
(2) 4 D. M. & G. 437.
(3) 3 B. & Ad. 743. 4 N.S.
(4) 8 E. & B. 457. [illegible]
(5) 1 H. L. C. 538.

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ment for separation, was in effect a voluntary settlement, and as such is valid, notwithstanding that no separation took place. The terms of the proviso suspending payment of interest to the wife during a subsequent cohabitation, shew the intention of the parties that the validity of the settlement should not depend upon the separation. Under such a proviso mere cohabitation, unless accompanied by an agreement in writing attested as there mentioned, would not have affected the rights of the wife: *Randle* v. *Gould* (1); *Wilson* v. *Mushett* (2); *Gawden* v. *Draper* (3). The statement of Mrs. *Bindley*, though it cannot affect the construction of the deed, explains the true nature of the transaction.

Mr. *Bardswell*, for the daughter and her husband:—

The trusts—viz., for the wife for her life and not only during coverture, and for the children—and the proviso shew that it was intended to be more than a mere separation deed; if the proviso could be objected to as contemplating a future separation, that would not affect the validity of the settlement: *Crouch* v. *Waller* (4). But even if the deed, so far as concerns the wife, must be treated as a separation deed, it is a good voluntary settlement so far as concerns the interests of the children, who are not within the consideration of separation. In *Westmeath* v. *Salisbury* (5) the decree was made without prejudice to the rights of the child.

LORD ROMILLY, M.R.:—

I am sorry that I am obliged to hold that this deed is wholly void, but I have no doubt that it is a separation deed made in anticipation of a separation which never took place, and consequently that the deed never took effect. I am asked to construe it as a voluntary settlement, but I cannot disregard the language of the deed. It begins by reciting the agreement of the husband and wife to live separate "upon the terms and conditions hereinafter contained;" that recital governs the whole deed, and the proviso which has been referred to, the covenants of the trustees, and,

(1) 8 E. & B. 457. 4 Jur NS 304
(2) 3 B. & Ad. 743.
(3) 2 Ventr. 217.
(4) 4 De G. & J. 302.
(5) 5 Bli. (N.S.) 339.

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indeed, every part of the deed, points to the separation as the consideration upon which it was based. The consideration has failed, and I must declare that the deed never took effect, and direct it to be cancelled.

Solicitors for all parties: Messrs. *Duncan & Murton.*

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arch 8, 9.

4 De G F & J
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8 Jur NS 854.
14 Eq. 186.

Fraudulent Conveyance—13 Eliz. c. 5—Setting aside Conveyance at Suit of Creditor—Form of Decree—Frame of Suit.

In order to entitle a creditor of a living debtor to set aside a fraudulent conveyance under the 13 Eliz. c. 5, it is not necessary that the creditor should have any lien or charging order on the property comprised in the conveyance; but in the absence of such lien the Court will not apply the property in satisfaction of the creditor's claim.

Semble, a bill to set aside such a conveyance ought to be on behalf of all the creditors of the debtor.

THE *Reese River Silver Mining Company, Limited,* was incorporated in June, 1865, under the provisions of the *Companies Act*, 1862. *Peter Aaris* was the promoter of the company, and *Joseph Atwell* was the chairman and one of the directors. In 1865 a sum of £6000 was, by the authority of *Joseph Atwell*, and *Sidney Edward Clarke* and *Capel Coape*, two of his co-directors, paid to *Peter Aaris* out of the company's funds. On the 28th of May, 1866, the company was ordered to be wound up. On the 23rd of January, 1867, the official liquidator took out a summons that an examination might be directed into the conduct of *Joseph Atwell* and his co-directors with reference to the payment by them of the sum of £6000 to *Peter Aaris,* and that they might be ordered to refund and repay to the assets of the company the said sum of £6000, together with interest thereon at £5 per cent. The summons was returned for hearing before the Chief Clerk of the Master of the Rolls on the 5th of February, 1867; and after repeated adjournments for the purpose of completing the evidence, was ultimately adjourned into Court, and came on to be heard on the 1st and 6th of May, 1867. On the latter of these days the Master of the Rolls made an order that *Joseph Atwell, Sidney Edward Clarke*, and *Capel Coape*, should, on or before the last seal in the sittings after Trinity Term, 1867, pay the sum of £6000 into Court. No part of the £6000 was paid into Court; and on the 2nd of November, 1867, it was ordered that *Joseph Atwell* should, on or before the 20th of December, 1867, pay the sum of £6000 to the official liquidator. No payment was made by *Atwell* in pursuance of this order; and *Clarke* and *Coape* were in insolvent circumstances.

On the 13th of February, 1867, *Joseph Atwell* granted a voluntary settlement of the following property:—(1), a sum of £2000, part of a sum of £3000, secured by mortgage on certain hereditaments in the county of *Wexford*, in *Ireland*; (2), 1000 shares in the *Queen's Hotel Company, Hastings, Limited*; (3), a sum of £800 secured by certain bonds of the *Victoria* Government; (4), a policy of insurance on his own life for the sum of £479 5*s.*; (5), a leasehold messuage, No. 72, *Bedford Gardens, Kensington*, contracted to be purchased by him from *Wellington Purdon*, and then in the occupation of him, *Joseph Atwell;* and (6), a debt of £156 17*s.* owing to him from the *Sweadale Mining Company*. The trustees were *Gregory Haines Atwell*, a son of *Joseph Atwell*, and *Wellington Purdon;* and the trusts were declared to be, during the life of *Joseph Atwell* to pay to him such part of the income of the trust property as the trustees might think fit, and also to permit him, if they should think fit, to reside in the said house, and after his death to convert the trust property into money, and to stand possessed of the sum of £500, part thereof, upon certain trusts for the benefit of *Catharine Atwell;* and as to the residue, to stand possessed of one moiety thereof for *Gregory Haines Atwell* absolutely, and to invest the other moiety and apply the income thereof for the support, maintenance, and benefit of *William Quin Atwell* during his life, and after his decease to stand possessed thereof upon trust for *Gregory Haines Atwell* absolutely.

The bill was filed by the company and the official liquidator for the purpose of setting aside this settlement, as having been contrived by *Joseph Atwell* for the purpose of delaying, hindering, and defrauding the Plaintiffs of their just and lawful claims; and it

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prayed for a declaration that the settlement was fraudulent and void as against the Plaintiffs, and for the delivery up and cancellation thereof; for an account of the income of the trust property received by the trustees; for a declaration that such income and the whole of the trust property were liable to make good what was due to the Plaintiffs; and for a sale of the trust property, and other consequential relief.

Joseph Atwell, by his answer, admitted that the settlement comprised the whole of the property to which he was entitled at the date thereof, with an insignificant exception.

The cause now came on to be heard. No attempt had been made to enforce the order of the 2nd of November, 1867, nor was there any evidence to shew that *Joseph Atwell* was insolvent.

Atwell deposed that his object in executing the settlement was to make a provision for his son, *William Quin Atwell*, who was of unsound mind, and unable to provide for himself, and for his granddaughter, *Catharine Atwell*, an orphan, and only six years of age.

Mr. *Southgate*, Q.C., and Mr. *Hastings*, for the Plaintiffs, relied on *Barling* v. *Bishopp* (1).

Mr. *Jessel*, Q.C. (Mr. *Bagshawe* with him), for *Wellington Purdon*:—

The Plaintiffs are not in a position to obtain a decree. The settlement is void only as against creditors who can make the property comprised therein available in satisfaction of their debts. The present Plaintiffs cannot do so. They ought to have obtained a charging order on the shares, and a garnishee order as to the debts. As to the leaseholds, they must be delivered in execution before they can be reached: 27 & 28 Vict. c. 112.

Mr. *Caldecott* (Sir *R. Baggallay*, Q.C., with him), for the persons beneficially entitled under the settlement:—

There is no evidence to shew that *Joseph Atwell* is at present insolvent. The Plaintiffs rely on the case of *Barling* v. *Bishopp*; but in that case there was no explanation of the settlor's reasons

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(1) 29 Beav. 417. 6 Jur NS 813.

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for executing the deed; whereas here the settlor has explained his motives in an affidavit, upon which he has not been cross-examined.

There is no case in the books in which a creditor has filed a bill against a living debtor to impeach a deed without first obtaining a judgment, and without proving the necessity of getting at the property comprised in the deed. That course was pursued in *Barling* v. *Bishopp* (1). It may be different where the debtor is dead, and the Court administering his assets arrives at the conclusion that he was insolvent at the date of the settlement. *Skarf* v. *Soulby* (2); *Adames* v. *Hallett* (3). The latter case shews that the property cannot be applied in satisfaction of the Plaintiff's claims, inasmuch as there may be other unsatisfied creditors of *Atwell.* The same thing appears from the form of decree in *Bott* v. *Smith* (4), which was carefully considered. Again, the Plaintiffs have no right to have the deed delivered up to be cancelled; there may be a surplus after payment of all the debts; and the deed would be good as to that. Hence the only decree that the Plaintiffs can obtain is a declaration that the deed is void. A Plaintiff is not entitled to a decree when he is in a position only to obtain a declaration which may be barren; he must be in a position to obtain the fruit of it. In *Colman* v. *Croker* (5) Lord Chancellor *Thurlow* says, that a creditor must put himself into a situation to complain by getting judgment for his debt. That supports Mr. *Jessel's* contention, that the Plaintiffs ought to have some lien on the property before they can have a decree. So in *Collins* v. *Burton* (6), a somewhat peculiar case, Lord Justice *Knight Bruce*, says: "It was very properly conceded that if there had not been any bankruptcy or any proceedings in the Insolvent Court against *Philip Barnes* the present bill could not have been sustained, because it is that of a simple contract creditor of *Barnes* on behalf of himself and other simple contract creditors, and does not allege that the Plaintiff has obtained any judgment, decree, or order, or that he is in the course of obtaining any."

The MASTER OF THE ROLLS:—The Lord Justice does not say

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(1) 29 Beav. 417. 6 Jur. N.S. 813
(2) 1 Mac. & G. 364.
(3) Law Rep. 6 Eq. 468.
(4) 21 Beav. 511.
(5) 1 Ves. 160.
(6) 4 De G. & J. 612, 616. 5 Jur. N.S

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that a judgment is necessary; all that he says is, that the Plaintiff should be in the course of obtaining one. In truth, the Plaintiff must shew that he is a creditor; that is the essential thing, and the judgment would be proof of that.

Mr. *Southgate,* in reply:—

All that is necessary to shew is, that the deed was contrived for the purpose of delaying, hindering, or defrauding creditors. It is not necessary to shew that the debtor is insolvent: *Townsend* v. *Westacott* (1); *Skarf* v. *Soulby* (2). Thus, if a debtor settled all the property which was readily accessible, and left only for his creditors property which, though of ample amount, could not readily be got at, the settlement would be void as delaying the creditors. Here the dates clearly shew what the settlor's object was.

In *Goldsmith* v. *Russell* (3) it was decided that it was unnecessary to obtain a charging order in order to set aside a settlement of shares.

[He asked leave to amend by making the Plaintiffs sue on behalf of themselves and all the other creditors of *Joseph Atwell,* and said that having regard to the circumstances of the beneficiaries under the settlement, he would not press for costs.]

Lord Romilly, M.R.:—

I am clearly of opinion that this deed comes within the 13 Eliz. c. 5, and that it was executed in order "to delay, hinder, and defraud creditors of their just and lawful actions, suits, debts, accounts, and damages." I am of opinion, as I was in *Barling* v. *Bishopp* (4), that where a man knows that a decision is about to be pronounced against him, and thereupon settles all his property, this comes within the exact words of the statute of *Elizabeth,* and that the Court will set it aside for the benefit of his creditors.

Now, in this case the settlor, *Joseph Atwell,* was the chairman of the *Reese River Company.* On the 23rd of January, 1867, the official liquidator took out a summons for an examination into his conduct with respect to certain matters. Upon this, no doubt, *Atwell* consulted some legal adviser, and probably was advised that an investigation

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(1) 2 Beav. 340; 4 Beav. 58.
(2) 1 Mac. & G. 364.
(3) 5 D. M. & G. 547.
(4) 29 Beav. 417.

Jan 14. 1885
Jan 14. [illegible]

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would certainly take place. Thereupon, not unnaturally, he desired to make a settlement of his property, and on the 13th of February he executed this deed. The order against him was made on the 6th of May. I am clearly of opinion that as soon as he saw that the matter would be investigated and that he could not resist the order, he conveyed away all his property for the benefit of his children, reserving power for the trustees to pay him such part of the income as they might think fit. I think that this is clearly void, having been done in anticipation of the order that was about to be made against him.

I am also of opinion, that no lien or charging order on the property is necessary to entitle the Plaintiffs to sue. The point was put with much confidence by Mr. *Jessel*, but neither he nor Mr. *Caldecott*, who has shewn much diligence in examining the cases, has cited any authority; and it appears that the same point was taken and overruled in *Goldsmith* v. *Russell* (1). I have little doubt that what was passing in Mr. *Jessel's* mind was the rule that the Court will not give equitable execution until the creditor has put himself in a position to obtain execution at law, in which case there is no question of the statute at all. But as soon as the Court finds that a deed has been executed for the purpose of delaying, hindering, or defrauding creditors, and that it comes within the statute, it sets the deed aside, but it goes no further; and the Plaintiffs must take some independent proceedings if they wish to have execution against the property in this deed. I shall give leave to amend, by making the bill on behalf of all creditors of *Joseph Atwell*. I shall declare that the deed of the 13th of February, 1867, is fraudulent and void as against the creditors; and I direct the trustees to do and concur in all acts necessary for making the trust property available to the creditors; and there will be no order as to costs, except that the liquidator is to have his out of the assets of the company.

Solicitor for the Plaintiffs: Mr. *T. E. Harper*.
Solicitor for the Defendants: Mr. *Brook*.

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(1) 5 D. M. & G. 547. 1 Jur N.S. 965.

In re LATYMER'S CHARITY.

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Jan. 16, 19, 29.

18 Ch D 34

Charity—Scheme—Education—Clothing—Selection for Proficiency—Capitation Fees.

A charity was founded in 1626 for the purpose of clothing eight poor boys of the town of *E.*, and causing them "to be put to some petty school to the end they might learn to read English, and there to be so kept until they should attain the age of thirteen years, thereby to keep them from idle and vagrant courses, and also instruct them in some part of God's true religion":—

Held, that the primary object of the charity was the education of very poor persons.

The income of the charity having greatly increased, a scheme was sanctioned containing the following provisions:—

The establishment of an elementary school confined to the sons of inhabitants of *E.*, and of a superior school not confined to the sons of inhabitants of *E.*

The payment of capitation fees by boys attending both schools.

The gratuitous education of a certain number of boys in both schools, those in the superior school to be selected by competitive examination, those in the lower school for proficiency, or good conduct, or for poverty, at the option of the trustees.

An allowance of clothing for twenty boys attending the lower school, to be selected for merit, regular attendance, or good conduct, or for poverty, at the option of the trustees.

THIS was a Petition by two of the inhabitants of the parish of *Edmonton* to discharge or vary an order of the Charity Commissioners for *England* and *Wales* establishing a scheme for a charity called "*Latymer's Charity.*"

Edward Latymer, of *London*, who died in 1626, by his will, after reciting that he had conveyed certain lands to trustees upon such trust as should be declared by his will, declared his will to be that the trustees should, within six months after his death, elect, nominate, and choose eight poor boys inhabiting within the town of *Edmonton*, being within the age of twelve years and above the age of seven years apiece, and should, with the rents, issues, and profits of the lands, provide for every of the said eight boys certain specified clothing, leather breeches and the like, and that such poor boys should be called "*Latymer's Poor Almsboys*," and also that the trustees should "cause the said poor boys to be put to some petty school to the end they may learn to read English, and there to be so kept until they shall attain the age of thirteen years, thereby to keep them from idle and vagrant courses, and also instruct them in some part of God's true religion;" and that upon any of the boys attaining thirteen, or dying, or departing out of the town of *Edmonton*, his allowance of apparel and schooling should cease as to them, and the trustees were to choose so many other poor boys of the said town from time to time in their stead to enjoy the said yearly allowance until they also should attain thirteen, or die, or depart the said town, and the trustees, their heirs or successors, should continue this course unto the end of the world.

In 1811 a schoolroom was built for the purposes of the charity with money bequeathed for that purpose by *Ann Wyatt.*

The number of boys clothed and educated had varied from time to time, and in 1868, the income having increased from £60 to £700 a year, the Charity Commissioners, on the application of the trustees, made the order in question, of which the following were the principal provisions:—

The trustees were to apply the yearly sum of £70 apiece towards elementary education in each of three ecclesiastical districts which had been carved out of the parish of *Edmonton,* by paying such sum to the managers and for the aid of such parochial schools for the time being maintained in the respective districts for the instruction of their poor as should be approved by the trustees, subject to certain conditions as to religious teaching.

The rest of the income was to be applied in maintaining a school in *Edmonton*, to be called "*Latymer's School.*" The school was to be divided into two branches; the instruction in the first branch to comprise, besides the usual elementary subjects, history, geography, algebra, mathematics, Latin and French, drawing, designing, &c.; that in the second branch to be elementary.

The first branch was to be open preferentially to the sons of all inhabitants of the original parish of *Edmonton;* and if the accommodation would extend further, then to other boys, between the ages of eight and sixteen; and the second branch to be open to the sons of all inhabitants of the parish (exclusive of the three districts), between the ages of seven and fourteen; and in both branches the boys to be admitted in the order of the applications for admission, except in special cases, for reasons to be recorded by the trustees.

The trustees might charge a quarterly sum not exceeding 30*s.* in the case of inhabitants of *Edmonton*, and not exceeding 50*s.* in other cases, for every boy attending the first branch, and a weekly sum not exceeding 6*d.* for every boy attending the second branch. These capitation fees were to be applied partly in increasing the stipends of the schoolmasters, and partly for the general purposes of the school.

Not less than three free scholarships in the first branch were to be offered every year to scholars, to be elected by competitive examination from the boys who should have been for two years in the second branch, or in one of the assisted district schools, and not less than twenty-five scholars in the second branch to be educated gratuitously, and eight boys in the same branch to be clothed; the selection in both cases to be made on the ground of superior proficiency, or good conduct, or in consideration of the comparative poverty of their parents, at the option of the trustees.

There was to be a master to superintend the whole school, but to teach in the first branch, with a yearly salary of £106 and a house, and a master of the second branch, with a salary of £80 a year and a house.

The scheme also provided for the payment of a life annuity to a discharged master.

Before the scheme was established a memorial was presented to the Commissioners by about 1500 of the poor inhabitants of *Edmonton,* objecting to the scheme on the ground that it would benefit the richer at the expense of the poorer inhabitants.

The principal objections to the scheme raised by the petition were—the extension of the benefit of the charity to all classes, and to persons not living in *Edmonton;* the provision of clothing for only eight boys, and the power to select those boys and the twenty-five free scholars on the ground of proficiency; the payment of the annuity to the discharged master; the payment of £70 a-year to each of the three districts; the division of the school into two branches; and the power to charge capitation fees.

The population of *Edmonton* is about 12,000, and a large proportion of the inhabitants are agricultural labourers. The three

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districts are at a considerable distance from the existing schools. Since the establishment of the scheme a national school at *Edmonton*, which had been supported partly by voluntary subscriptions, had been abolished, and most of the scholars had been transferred to the second branch of *Latymer's School*. At Christmas, 1868, there were 139 scholars in the second, and 20 in the first branch; and the first branch had cost the charity between £30 and £40 since it was opened.

In the course of the argument, the Master of the Rolls expressed his opinion that, under the circumstances, the payment of the annuity to the late master could not be sanctioned.

Mr. *Southgate*, Q.C., and Mr. *E. Ward*, for the Petitioners:—

In settling a scheme for the administration of a charity, the Court is bound to give effect to the wishes of the founder: *Phillpott* v. *St. George's Hospital* (1); *In re Lambeth Charities* (2); and where the funds of the charity have become more than sufficient for its original objects, the surplus will be applied in extending the same benefits to an increased number of persons, if such persons exist, answering the description contained in the will: *Attorney-General* v. *Corporation of Rochester* (3). Here the primary intention of the testator was to clothe and provide with an elementary education very poor children in *Edmonton*, and there are now a great number of very poor inhabitants to whose children the benefits of the charity ought to be extended. But this scheme makes no increase in the provision of clothing, establishes a school for the benefit of the middle class, admits to that school persons not inhabitants of *Edmonton*, excludes even from the lower school the children of the very poor by imposing capitation fees, and makes proficiency instead of poverty the test by which the recipients of clothing and gratuitous education are to be chosen; in all these respects departing from the purposes of the charity. The contributions to the schools in the district parishes will merely relieve the subscribers to those schools. In *Re Ashton's Charity* (4) it was impossible to apply the increased income to an increased number of almswomen, because the number of almshouses was limited.

(1) 27 Beav. 107. 5 Jur NS 664

(2) 22 L. J. (Ch.) 959.

(3) 5 D. M. & G. 797.

(4) 27 Beav. 115. 5 Jur NS 665

In the *Manchester School Case* (1) the admission of boys at an annual payment was justified on the ground that the founder intended to benefit the rich as well as the poor, and in that case competitive examination was not sanctioned.

Mr. *Jessel*, Q.C., for the trustees of the charity:—

The Court is not—nor are the Commissioners, who have the same power as the Court—bound to apply the increased income of a charity in increasing the number of the original objects, but such increased income may be applied for any other charitable purposes: *Re Ashton's Charity* (2). In *Attorney-General* v. *Rochester* (3), and *In re Lambeth Charities* (4), the original trust was unlimited. But, in fact, this scheme carries out the main purpose of the founder: viz., education. Clothing was only a secondary object, and need not be extended. The proposed middle class school is within the scope of the founder's will, which need not be construed as referring to the very poorest class; and besides being of great benefit to a class of persons for whose education very inadequate provision is now made, will benefit the poor by increasing the funds of the charity, as in *Manchester School Case*, and by providing a certain number of them with a superior education gratuitously. The payment to the district parishes, which are too distant to avail themselves of the charity school, is strictly within the scope of the founder's will.

Mr. *Archibald Smith*, for the managers of one of the district schools, supported the scheme.

Mr. *V. Hawkins*, for the Attorney-General:—

In applying the increased income the Court may alter not only the proportions in which the objects of the charity would take under the instrument of foundation, but also the objects themselves: *Attorney-General* v. *Mayor of Bristol* (5). In this case the Attorney-General considers that education of the poor was the primary object of the foundation, and agrees in the main with the scheme, but suggests that the funds of the charity should only be

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11 Jur NS 946

(1) Law Rep. 1 Eq. 55; 2 Ch. 497.

(2) 27 Beav. 115. 5 Jur NS 665.

(3) 5 D. M. & G. 797.

(4) 22 L. J. (Ch.) 959.

(5) 2 Jac. & W. 319.

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applied to the superior school after providing sufficient education in the lower school for all the children of poor inhabitants who require it, and that the number of boys to whom an allowance of clothing is made should be slightly increased.

Mr. *Ward*, in reply.

Jan. 29. LORD ROMILLY, M.R.:—

This is a Petition presented by some of the inhabitants of *Edmonton* (whether it is to be said the town or parish of *Edmonton* is somewhat questionable), for the purpose of reviewing a scheme which has been approved of by the Charity Commissioners for the settlement of a charity. It was very fully argued before me, and I have considered the case very fully since, and have looked at all the evidence upon the subject. The evidence is not very voluminous, and there is no difficulty or doubt about it.

The first question is, whether or not it is the primary object that the charity should be devoted to education. I am of opinion that the primary object of the charity is education, and that is very important for the purpose of considering the objections to the scheme which are raised in the Petition.

[His Lordship then stated the terms of the will, and observed that in the absence of any evidence as to whether there was any considerable town of *Edmonton* at that time, the word "town" must be construed as equivalent to "parish," and continued:—]

Now it is quite clear this was intended for very poor boys; it is obvious, in my opinion, that they were intended to be boys of that age who could not earn money for themselves, who were likely to get into bad company, and who were to be put in a school to learn what was the elementary education at that time, and to be clothed for that purpose. I think the clothing was to be given as an adjunct ancillary to the education. I think, therefore, that the Commissioners have come to a right conclusion when they thought that education was the primary object of this charity. That being so, it is necessary to take into consideration the great alteration that has taken place in education since that period. This charity was founded a little under two centuries and a half from the present time, and the education that was fitting for boys of that period would be a little extended now, and if other means can be found of improving and adding to that, it would be very useful, and fully within the scope of the charity. By the liberality of subsequent donors a school-house has been built, and a school has in point of fact been formed, though the original testator only supposed that the boys would be put to school. Taking the view indicated by these preliminary observations, I see very little to alter in the scheme of the Charity Commissioners, because it appears to me that they have done (I have gone through the scheme very carefully) very much what was fit and proper.

I will go through the objections which the Petitioners make, and state what little alterations it appears to me the scheme requires. They say first, that it extends the benefit of the charity to all classes, instead of confining it to providing clothing and an elementary education for poor boys only of the town of *Edmonton*, according to the express wishes of the testator. Now, I think that according to this scheme it is quite possible to combine with the elementary education for the poor boys only of the town of *Edmonton* an improved education, and that this may be beneficial to the boys who receive an elementary education, as an incitement to them to rise into the superior school; and therefore I do not think that if that is well conducted it is of itself injurious. The evidence on the subject is not such that it can be ascertained at this moment what would be the ultimate result of the proposed arrangement. At present it appears that the superior school costs about £30 or £40 to the other, but if it should succeed (and I think they may always come to the Court, if there is a failure, to have a variation of the scheme), and there should be an increase in the number of boys in the superior school, not only would it cost the boys in the lower school for elementary education nothing, but it might increase the fund applicable for the general purposes of education.

The second objection is, that clothing is to be provided for eight boys only, and that the boys to receive the benefit of this provision are to be elected not on account of their poverty only, but on account of their merit or their poverty, at the option of the trustees. I think, as I expressed at the time, and Mr. *Vaughan Hawkins,* on behalf of the Attorney-General, seemed to express the same opinion, that considering the extent to which this charity has increased in value, producing now £700 a-year, a larger number of boys ought to receive an allowance of clothing, and I think one of the gentlemen who was present during the argument suggested that the number should not exceed twenty-five, and probably if twenty were put as the number, that would be a beneficial arrangement, and I think that is in accordance with the view of the scheme and with the scope of the charity.

I approve entirely of what the scheme suggests, that it shall be at the option of the trustees, and that poverty shall be one element in directing their choice, but that also good behaviour and progress in the school should be another element in their selection, and accordingly I think that it would be desirable to increase the number of boys to twenty, leaving it still at the option of the trustees to make the choice, but expressing my opinion that in making that selection they ought to be guided principally by the merit of the boys, and to some extent by the fact of their poverty. That is to say, supposing there are two boys who are equal or nearly equal, they should select the poorer of the two, the one to whom the gift would be the greater charity. I do not propose to make the slightest alteration in the scheme in respect of the clothing. The clothing prescribed by the will is, of course, not suited to this time, and the trustees should do it in such a manner as they think fit. With respect to little boys, they can provide them with appropriate clothing. I suppose it is only necessary that they should have one garment which would last the year, and if there are twenty boys it may be done very cheaply. I think that would be in accordance with the object of the charity, and in fact this appears to me to be the principal motive which has induced the inhabitants of *Edmonton* to bring this matter before the Court, and I cannot of course disregard the fact that 1500 of the inhabitants of this parish have joined in a memorial expressing their opinion that some alteration to this effect should be made.

The next objection is, that twenty-five free scholars may be selected by the trustees for proficiency, as well as in consideration of poverty. That is a principle of selection which I think is quite right, and I do not see any reason whatever to remove or alter it. That will increase the efficiency of the school, and give the boys a motive to teach themselves. Of course it ought never to be forgotten in all cases of schools, and the sooner it is impressed on the boys the better, that nobody, without his own exertion, was ever taught anything in his life. The only thing you can do is to give the pupil great facilities for teaching himself, and the sooner boys are taught that it depends on themselves what they learn, and that the more they set earnestly and stedfastly to work the greater facility and encouragement they will get, the better for them. The fourth objection is as to the life annuity. I have disposed of that already, and I do not say anything more upon that; it must be omitted.

The fifth objection is to the payment of £70 to each of the three ecclesiastical districts of *Edmonton*. I think that this is within the scope of the original foundation, because the testator mentions the town of *Edmonton*, which, as I have said, I think means the parish, and the parish seems to be very extensive, some parts of it four miles off, and therefore it would be very inconvenient that the boys should have to walk eight miles a day, particularly very little boys, and in all weathers, and therefore it is convenient that this money should be so applied, it being understood that the £70 is to be for the purposes of education. I do not think that these payments should be compulsory, I am not sure whether the scheme is clear upon that, but that it should be in the discretion of the trustees to withhold the £70 if it is not applied properly. I feel satisfied that they will exercise their discretion in the most beneficial manner for the school.

Then I do not object to the benefit of the charity being extended to persons living beyond the precincts of the original parish of *Edmonton*, understanding that those are persons who are admitted into the upper school, not into the lower (the lower school must be confined to the inhabitants of the parish of *Edmonton*), and that I think will be beneficial, and the result of it may be that they will get a better master. I am also of opinion that the capitation fee is right; the experience I have had in settling cases of this description in Chambers is, that a small capitation fee is a benefit, and that people do not very much care for education which is purely gratuitous. I find that a small capitation fee —but it should be a very small one unquestionably—reconciles

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them to education, and becomes beneficial. In all other respects the scheme is not complained of, and it must be confirmed. Therefore those little alterations must be made, and Mr. *Vaughan Hawkins* will be good enough to see that those are expressed in the scheme.

Solicitor for the Petitioners: Mr. *Angell.*

Solicitors for the Respondents: Messrs. *Farrer, Ouvry, & Farrer;* Messrs. *Church, Sons, & Clarke;* Messrs. *Fearon & Co.*

STUART *v.* COCKERELL.

V.-C. M.
1869
Feb. 1;
March 5.

Remoteness—Substitution or Original Gift.

After a gift to an unborn person for life, there may be a good gift over if it vest within lives in being and twenty-one years.

Gift after the death of an unborn tenant for life to all the children of *A. B.*, a living person, share and share alike, and the child or children of such of the said children as shall be then dead, according to the Statute of Distributions; but in case there shall be no child or grandchildren of the said *A. B.* then living, then over.

This is not an original gift to the children of *A. B.* vesting at birth, with a mere invalid substitutionary gift to their children; but is an original gift to children and grandchildren living at the decease of the unborn tenant for life, and therefore too remote, and void.

The cases of *Ashley* v. *Ashley* (1) and *Avern* v. *Lloyd* (2) commented upon.

11 Eq 327.
—501
3 Ch D 158-9
—212-3,
19 Ch D 523
20 Ch D 68

Affd 5 Ch 714

THIS case was argued upon Petition.

Elizabeth Edgley Hewer, by her will, dated the 21st of March, 1782, devised and bequeathed all her real and personal estate to trustees to sell and convert, and to invest the proceeds on government securities, and to pay the interest, dividends, and proceeds to her nephew, Sir *Simeon Stuart*, Baronet, for his life for his own use, and after his decease upon trust to pay the said interest, dividends, and proceeds to the eldest son of Sir *Simeon Stuart* [he being then unmarried] for life for his own use and benefit, and after the decease of the eldest son of Sir *Simeon Stuart*, then upon trust to pay the said interest, dividends, and proceeds to her niece *Elizabeth Stuart* for life for her own use and benefit, and after the decease of the survivor of them, the said Sir *Simeon Stuart*, his eldest son and *Elizabeth Stuart*, then upon trust "to pay and transfer the said government securities unto all and every the children of my said nephew, Sir *Simeon Stuart*, share and share alike, if more than one, and if but one then to such one child, and the child or children of such of the children of the said Sir *Simeon Stuart* as shall be then dead, according to the statute of distribution of intestate's estates; but in case there shall be no child or grandchild of the said Sir *Simeon* then living, then upon trust to

(1) 6 Sim. 358.

(2) Law Rep. 5 Eq. 383.

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pay and transfer the said government securities unto all and every the children of my said niece *Elizabeth*, equally to be divided between them if more than one, and if but one, then to such one child, but in case there shall be no child of my said niece then living, then upon trusts to pay and transfer the said government securities unto *Charles Cockerell*, to whom I give the same accordingly."

The testatrix died in 1785. The eldest son of Sir *Simeon Stuart*, Sir *Simeon Henry Stuart*, was born on the 23rd of October, 1790, and his second son, the Petitioner, *William Henry Frederick Hewer Stuart*, was born in May, 1794. He had also two other children, who died in his lifetime. Sir *Simeon Stuart* died in January, 1816, intestate. *Elizabeth Stuart* died in November, 1846, and Sir *Simeon Henry Stuart* died in October, 1868.

The produce of the real and personal estate had been paid into Court in the suit which was to administer the estate. The income had been paid to the three successive tenants for life, and a question now arose as to how the capital was to be disposed of, a Petition being presented by *William Henry Frederick Hewer Stuart* praying that he might be declared entitled to the whole of the fund, or if not, then to a proportion of the property as next of kin of the testatrix.

Mr. *Cotton*, Q.C., and Mr. *Riddell*, for the Petitioner:—

The gift to the children of Sir *Simeon Stuart* vested at birth. There were four children. The shares of the two deceased infants became the property of their father, who died intestate.

The Petitioner taking one-fourth in his own right, and one-fourth as one of the next of kin of his father, is entitled to one-half of the fund.

The gift to the children of deceased children was a mere substitutionary gift, which was intended to take effect at the death of the unborn tenant for life, and was plainly too remote; but this has no effect on the original gift to the children of Sir *Simeon Stuart*, which remained valid: *In re Bennet's Trusts* (1).

The VICE-CHANCELLOR:—Is not the gift void for remoteness? You wish, I suppose, to bring yourself within *Roe* v. *Jeffery* (2)?

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(1) 3 K. & J. 280.

(2) 7 T. R. 589.

Mr. *Cotton*:—I entirely subscribe to the authority of that case, which decides, that though a shifting use is too remote if it is limited to take effect on an indefinite failure of issue, yet that it is not too remote if limited to take effect on a failure of issue which, in terms or by context, is limited to take effect within lives in being and twenty-one years; and that a use divesting the fee on failure of issue, and carrying the estate to a living person for life only is good, but that if it purported to carry over the fee it would be bad, for in the latter case the gift over does not necessarily vest within lives in being and twenty-one years. The gift must actually vest within that period: *Cadell* v. *Palmer* (1).

But there is no shifting or divesting here. It is not a case of contingent gift at all.

There is a good gift to the children of Sir *Simeon Stuart* vesting at birth; not the less good because preceded by valid gifts for life to persons born and a person unborn: *Routledge* v. *Dorril* (2); *Beard* v. *Westcott* (3); *Lewis* on Perpetuities (4).

Mr. *Shapter*, Q.C., and Mr. *Woodroffe*, for parties claiming under Sir *Simeon Henry Stuart*, followed the same course of argument as the Petitioner:—

The gift to the children of the children was merely substitutionary; the true meaning of substitutionary appears from *Loring* v. *Thomas* (5), and *Re Turner* (6).

The substitutionary gifts and gifts over are to be construed strictly, and do not affect the validity of the original gift: *Jopp* v. *Wood* (7).

[On the question of remoteness they referred to *Lewis* on Perpetuities (8); *Hayes* on Conveyancing (9); *Jarman* on Wills (10) *Jarman's Bythewood* (11); *Gilbert* on Uses, by *Sugden* (12); *Ashley* v. *Ashley* (13); *In re Merrick's Trusts* (14); *Avern* v. *Lloyd* (15).]

(1) 1 Cl. & F. 372.
(2) 2 Ves. 357.
(3) 5 Taunt. 393; 5 B. & A. 801.
(4) Page 164.
(5) 1 Dr. & Sm. 497. 7 Jur N.S. 1116
(6) 2 Ibid. 501.
(7) 2 D. J. & S. 323.
(8) Page 423.
(9) Vol. i. p. 495.
(10) 1st Ed. vol. i. p. 241; 2nd Ed. vol. i. p. 229.
(11) Vol. xi. p. 188.
(12) Pages 270—274.
(13) 6 Sim. 358.
(14) Law Rep. 1 Eq. 551. 12 Jur N.S. 245
(15) Ibid. 5 Eq. 383.

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All property is alienable: *Egerton* v. *Massey* (1); *Kekewich* v. *Manning* (2). If, after giving a life interest to a person unborn, a reversion remains in the settlor which he can alien, why cannot he settle it by the same assurance?

Mr. *Fleming*, Q.C., and Mr. *Wickens*, for *Carr*, the personal representative of *Elizabeth Stuart*:—

There was intestacy after the life estates. *Elizabeth Stuart* was entitled to half the capital of the personalty. The gift of the *corpus* was too remote. There was not a substitutionary gift, but an original gift to children of Sir *Simeon Stuart* living at the death of the survivor of the tenants for life, and to the children of such of the children as should be then dead. The words "then dead," and "then living," shew that children, as well as children of deceased children, were to be living at the death of the last survivor of the tenants for life, including the unborn son.

Mr. *Cottrell* appeared voluntarily for beneficiaries represented by *Carr*, the personal representative of *Elizabeth Stuart*, but the Vice-Chancellor declined to hear him.

Mar. 5. SIR R. MALINS, V.C.:—

It is contended on the part of the Respondents that all the gifts after the life estate to the eldest son of Sir *Simeon Stuart* are void for remoteness. Property may be given by will, or secured by settlement, to an unborn person for life, or to several unborn persons successively for life, with remainders over, provided the vesting of the remainders, or the ascertainment of those who are to take in remainder, be not postponed till after the death of such unborn person or persons: *Ashley* v. *Ashley* (3); *Lewis* on Perpetuities (4); *Jarman* on Wills (5); *Gilbert* on Uses, by *Sugden* (6). I refer to those as illustrative passages, because they were cited in argument, but, of course, there are many more.

In the present case, therefore, the life interest of the unborn son of Sir *Simeon Stuart* would have caused no difficulty if those who were to take in remainder, subject to that life interest, could have been ascertained with certainty within the allowed period of a life or lives in being at the death of the testatrix, and twenty-one years after. But the gift is to a class of persons consisting of the children and grandchildren of Sir *Simeon Stuart* who should be living at the death of the survivor of Sir *Simeon Stuart,* his unborn son, and the testatrix's niece, *Elizabeth Stuart.* That necessarily postponed the ascertainment of the class to take, and, consequently, the vesting of the property till after the expiration of a life not in being at the death of the testatrix, and the gift is therefore necessarily void for remoteness.

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(1) 3 C. B. (N.S.) 338. 3 Jur. N.S. 1395
(2) 1 D. M. & G. 176.
(3) 6 Sim. 358.
(4) Page 423.
(5) 3rd Ed. vol. i. p. 264.
(6) Page 269, n.

The case is, in principle, like *Jee* v. *Audley* (1), where the gift was, if a person should die without issue, then to the children of two living persons. Of course a gift over on failure of issue would be void for remoteness as to mere personal property, but a gift over to children living would have been good if it had been to children living at the death of the testatrix; but as those persons might have had other children, it was impossible to say that it meant children then living. That was held void for remoteness, and Lord *Kenyon* would not assume that the two aged persons might not have had other issue. That case of *Jee* v. *Audley* I followed in *In re Sayer's Trusts* (2). *In re Bennet's Trusts* (3) was much relied on by Mr. *Shapter* and Mr. *Cotton,* who argued in support of the validity of the bequest, but there all the gifts in remainder were to take effect at the expiration of lives in being, and the question of remoteness could not therefore arise. It was a mere question who was to take at the death of the two children of the testator who were living at the time of making his will. That case, therefore, has no application to the doctrine of remoteness, upon which this question must be determined. If the gift over after the death of the unborn son of Sir *Simeon Stuart* had been confined to the life interest of the niece, it would have been good upon the principle of *Roe* v. *Jeffery* (4). That was a devise to *Thomas Friswell* and his heirs for ever; and if he died without issue over to four other persons without words of limitation. Therefore if the limitation was on death without issue generally, that was an estate tail; if it

(1) 1 Cox, 324.
(2) Law Rep. 6 Eq. 319.
(3) 3 K. & J. 280.
(4) 7 T. R. 589.

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meant dying without issue within a limited period, it was a fee, with an executory devise over. The Court of Queen's Bench held that it was a fee, with an executory devise over. The devisees over could only take for life. The failure of issue must necessarily be within lives in being. In the present case, if the bequest over had been confined to the niece for life, it would have been good, as it must have taken effect in her lifetime or not at all. But as her life interest was followed by remainders to the children and grandchildren, the case is like *Barlow* v. *Salter* (1), which draws a very remarkable difference, and is an authority of the very highest importance. That was a bequest of purely personal estate. It was in these few words: "All my estate, real and personal, of every sort and kind, to my daughter and her heirs, and half the navigation money for her natural life; and in case she dies without issue, all to be divided between my four nephews and nieces, *Nathaniel, William*, *Catherine*, and *Elizabeth; Catherine's* part only for life, and her part to be divided between the survivors." Now, if this bequest had stopped with the gift over to *Catherine* for life, it would have been good; it would then have been like *Roe* v. *Jeffery* (2). But as the gift for life was followed by an absolute gift to children and grandchildren, the case falls within the rule laid down by Sir *W. Grant* (3), that "Where nothing but a life interest is given over, the failure of issue must necessarily be intended a failure within the compass of that life; but where the entire interest is given over, the mere circumstance that one taker is confined to a life interest, furnishes no indication of an intention to make the whole bequest depend upon the existence of that person at the time when the event happens on which the limitation over is to take effect." I was referred to two cases by Mr. *Shapter* after the argument, which I noted down, and have looked at. The first is *In re Merrick's Trusts* (4). I am not able to see that that has any particular application to the present case, because the events there did not call for any application of the doctrine of remoteness. But the second case, of *Avern* v. *Lloyd* (5), is apparently applicable. That was a decision of Vice-Chancellor *Stuart* in the year 1868. It was a "bequest of personal estate to unborn issue as tenants for life"—that is, it was to all the children of *A.*, who, as yet, had no children, "as tenants for life;" to that there could be no objection,—"and to the executors, administrators, and assigns of the survivor of the unborn issue." Vice-Chancellor *Stuart* held that that gave an absolute interest to the survivor. Now, that may be reconciled thus:—The words "executors, administrators, and assigns" following a gift of a life estate are words of limitation. If the Vice-Chancellor construed it thus, that it was a gift to all the children for life, with a limitation to one of them absolutely, it may possibly be reconciled. But if he intended to decide that the vesting of any gift whatever can be postponed till after the expiration of lives not yet in being, then, with every respect for the Vice-Chancellor, I must differ from his opinion, because nothing can be more clearly settled, and it was finally settled by *Cadell* v. *Palmer* (1), that you may postpone the vesting of property during a life or lives in being, and the period of twenty-one years in gross afterwards; but that every gift which must not necessarily vest within that period is void.

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(1) 17 Ves. 479.

(2) 7 T. R. 589.

(3) 17 Ves. 482.

(4) Law Rep. 1 Eq. 551. 12 Jur. NS 24

(5) Law Rep. 5 Eq. 383.

A gift, therefore, to take effect at the expiration of lives not yet in being must necessarily be void. The Vice-Chancellor, I see, uses this expression: "Considering that this limitation to the executors, administrators, and assigns must take effect in the lifetime of one of the unborn issue to whom a good estate for life is given, so as to give him an absolute estate in possession when he becomes survivor, it is not easy to see on what ground it can be considered as too remote." It is clearly too remote if the persons who were to take were not to be ascertained until all the unborn persons were dead. "The gift to the executors, administrators, and assigns of the surviving tenant for life attaches to the life estate, so as to give a contingent absolute interest to each tenant for life." That, I think, was the ground upon which the Vice-Chancellor decided it, and upon that ground it may be right; but if it was intended to say that you may postpone the gift until after the expiration of the lives of all those unborn persons, it is perfectly plain that that is in opposition to all the settled rules on the subject. But I do not think that Vice-Chancellor *Stuart* intended to

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(1) 1 Cl. & F. 372.

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decide anything of the kind. I may make an observation, also, on the case of *Ashley* v. *Ashley* (1), which was cited by Mr. *Shapter*, where Vice-Chancellor *Shadwell* held that you might give an estate to unborn persons for life as tenants in common, with cross remainders between them for life. Now, if you were to give an estate to *A.* for life, with remainder to his children as tenants in common in fee, and provide that if any one of the unborn children should die without issue living at the time of his death his share should go over, nobody would for a moment contend that such a gift over would be good because it is a cross limitation to take effect at the death of an unborn person. Therefore it is that on such limitations, with cross limitations in fee, every person acquainted with the subject takes care to make the gifts over upon the death of the children under twenty-one, it being perfectly clear that if you give to *A.* for life, with remainder to his children as tenants in common in fee, and provide that if any of the children shall die under the age of twenty-two years the shares given to them shall go over, the original gift to them as tenants in fee is good; and the cross limitations are void, as being too remote. If therefore twenty-two years is too remote, how can it be good when it is at the expiration of a life not yet in existence? Therefore, with great respect to the memory of Sir *Lancelot Shadwell*, I cannot help thinking that he went too far in *Ashley* v. *Ashley*, in holding that life estates may be given to unborn issue as tenants for life, with cross remainders between them, because every cross limitation must be either a remainder upon an estate tail, or it must be a cross executory bequest or limitation, limited so as necessarily to take effect within a life in being and twenty-one years afterwards.

The only point therefore here is:—Is it a gift, as I have stated it, to a class of persons to be ascertained at the expiration of the life of an unborn person? It is perfectly clear to my mind that the whole class is a class consisting of children and grandchildren, and that the class could not, under the terms of this will, be ascertained until all the three tenants for life were dead. That was too remote a period.

The object of the testatrix was to give to the children and grandchildren of Sir *Simeon Stuart*, if there were any at that period; if

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(1) 6 Sim. 358.

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not, then to the children of the niece; if no children of the niece, then to Sir *Charles Cockerell*.

Therefore, upon every ground, this appears to me to be a limitation void for remoteness, not simply, as I have already said, because there is interposed a life interest to an unborn person, but because the vesting is postponed until after the expiration of that life. There must therefore be a declaration that the limitations are void for remoteness, the consequence of which, I apprehend, will be that the next of kin of the testatrix will take.

Solicitors for the Petitioner: Messrs. *Ward, Mills, & Witham.*
Solicitor for the Respondents: Mr. *W. A. Ford.*

GIBBINS *v.* EYDEN.

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Feb. 16, 22.

Specific Devise of Part of Mortgaged Estate—Exoneration of Mortgaged Estate—Estate by Curtesy—Bankruptcy of Husband.

17 Eq 558-9
10 Ch 138
16 Ch D 627-8
17 Ch D 117

The owner of two estates subject to the same mortgage, specifically devised one of them, and left the other to pass by a residuary devise:—

Held, that the residuary devise was specific, and that the two estates must therefore bear the mortgage debt rateably.

Where a wife's real estate did not fall into possession till after the husband's bankruptcy and discharge:—

Held, that the husband, though there had been issue of the marriage, had not at the time of his bankruptcy any such contingent interest in the estate, as tenant by the curtesy, as would pass to his assignees.

By an indenture of mortgage dated the 26th of July, 1845, *Richard Claridge* conveyed his *Heyford* and *Bugbrooke* estates to *Charles Markham* and *Christopher Markham* in fee, by way of mortgage for securing the sum of £6600 and interest. The *Bugbrooke* estate was subject to a prior mortgage for securing £500 and interest.

By his will, dated the 30th of May, 1854, *Richard Claridge* devised the *Bugbrooke* estate to *James Bazeley* in fee, and devised all his residuary real estate (which consisted only of the *Heyford* estate) to his wife for life, and after her death to his niece *Annie*, the daughter of *John Bazeley*, and his nephew *John Eyden*, their

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heirs and assigns, as tenants in common. The testator died on the 30th of May, 1854, and his widow on the 1st of December, 1867.

In the month of April, 1866, *Thomas Gibbins*, who had married the testator's niece *Annie*, and by whom he had had issue, was adjudicated bankrupt, and creditors' assignees were duly appointed under the bankruptcy. He obtained his discharge on the 1st of July, 1866. His wife died on the 1st of July, 1868, after the commencement of the present suit.

The suit was instituted for the administration of the real and personal estate of the testator *Richard Claridge*, and two questions arose, first, whether the *Heyford* and *Bugbrooke* estates ought to bear the mortgage debt of £6600 rateably, or whether the *Heyford* estate, having passed by the residuary devise, should bear the whole debt: and, secondly, whether *Thomas Gibbins*' estate, as tenant by the curtesy, passed to his assignees in bankruptcy.

Mr. *Cotton*, Q.C., and Mr. *Crossley*, for the Plaintiff, *Annie Gibbins*:—

As to the first point: a residuary devise of real estate remains specific, notwithstanding the *Wills Act*, s. 24; *Hensman* v. *Fryer* (1). [They also mentioned *Brownson* v. *Lawrance* (2).]

As to the second point: the Plaintiff was not entitled in possession at the time of her husband's bankruptcy, and therefore he had not then such an inchoate right to curtesy as would pass to his assignees.

Mr. *De Gex*, Q.C., for the Defendant *John Eyden*, an infant, in the same interest:—

The term "residuary real estate" must be construed as if the testator had first mentioned both his estates, had then devised his *Bugbrooke* estate, and then his *Heyford* estate. *Mirehouse* v. *Scaife* (3); *Jarman* on Wills (4). And in this respect the law is not altered by the *Wills Act*: *Hensman* v. *Fryer* (1); *Emuss* v. *Smith* (5); *Pearmain* v. *Twiss* (6); *Edwards* v. *Pugh* (7).

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(1) Law Rep. 3 Ch. 420; 2 Eq. 627.
(2) Ibid. 6 Eq. 1.
(3) 2 My. & Cr. 695, 706.
(4) 3rd Ed. vol. ii. p. 589.
(5) 2 De G. & Sm. 722.
(6) 2 Giff. 130. 6 Jur N.S 337
(7) 2 Giff. 135 (*b*).

Mr. *J. H. Palmer*, Q.C., for *Thomas Gibbins*, the bankrupt:—

Thomas Gibbins' assignees are not entitled to his life estate by the curtesy. All that passes to the assignees is an existing interest; here, at the time of his bankruptcy and discharge, he was only entitled to an interest in expectancy: *In re Inkson's Trusts* (1).

Mr. *Glasse*, Q.C., and Mr. *A. E. Miller*, for *James Bazeley*, the devisee of the *Bugbrooke* estate:—

The devise of the *Heyford* estate being in the form of a residuary devise, is an implied direction that the residuary estate should satisfy the mortgage debt to the exoneration of the estate specifically devised: *Harris* v. *Watkins* (2); *Hanby* v. *Roberts* (3); referred to in that case; *Francis* v. *Clemow* (4); *Mirehouse* v. *Scaife* (5). *Brownson* v. *Lawrance* (6) has expressly decided that where the owner of the equity of redemption of two estates comprised in the same mortgage specifically devised one estate, and left the other to pass by a residuary devise, he thereby signified a "contrary or other intention" within the meaning of *Locke King's Act* (17 & 18 Vict. c. 113), so as to make the estate which passed by the residuary devise primarily liable to the whole of the mortgage debt.

Mr. *Dryden*, for the Defendant *George Tarry.*

Mr. *Osborne Morgan*, for an annuitant.

Mr. *Shebbeare*, for other parties.

Mr. *Osborne*, Q.C., for *Thomas Gibbins*' assignees:—

The bankrupt had a contingent interest in the estate at the time of his bankruptcy, being tenant by the curtesy initiate: *Jones* v. *Davies* (7); *Bacon's* Abridgment, "Curtesy" (D); and it is settled that a contingent interest or possibility in a bankrupt will pass to his assignees: *Higden* v. *Williamson* (8).

Mr. *Cotton*, in reply.

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(1) 21 Beav. 310.
(2) Kay, 438.
(3) Amb. 127.
(4) Kay, 435. 18 Jur 223
(5) 2 My. & Cr. 695.
(6) Law Rep. 6 Eq. 1.
(7) 8 Jur. (N.S.) 592.
(8) 3 P. Wms. 132.

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Feb. 24. SIR R. MALINS, V.C.:—

The first question which was argued, which I have now to determine, is the proportion of the entire mortgage debt to be borne by the devisees of the *Heyford* and *Bugbrooke* estates. On the part of the Plaintiff, and the Defendant the infant *John Eyden*, who are the devisees of the *Heyford* estate, and also on the part of the Defendant *Thomas Gibbins*, it was contended that the two estates must bear the debt rateably according to their respective values; while, on the part of the Defendant *Bazeley*, who is the devisee of the *Bugbrooke* estate, it was contended that the *Heyford* estate must bear the whole debt, because it was devised as the residuary real estate of the testator, and is therefore liable to exonerate the specifically devised estate.

It was admitted that if the estates had been specifically devised, that is, if the *Heyford* estate had been devised by name as the *Bugbrooke* estate was, the two estates must have borne the mortgage debt rateably. It was not, and could not be questioned that before the *Wills Act* (1 Vict. c. 26), every devise of land, whether given by name, or passing by a residuary devise, was specific. But it was decided by the Vice-Chancellor *Kindersley* in *Dady* v. *Hartridge* (1), and *Hensman* v. *Fryer* (2), that since the *Wills Act* a residuary devise of real estate is not specific, because the 24th section makes the will speak as if it had been executed immediately before the death of the testator. I confess I am unable to follow the reasoning of my learned predecessor, as I cannot see any reason for a devise being less specific because the will speaks at one time instead of another. The decision of the Vice-Chancellor *Kindersley* was, however, followed by the Master of the Rolls in *Rotherham* v. *Rotherham* (3), and *Bethell* v. *Green* (4). But Vice-Chancellor *Stuart* held the contrary in *Pearmain* v. *Twiss* (5). In this conflict of opinion, the decision of the Vice-Chancellor *Kindersley* in *Hensman* v. *Fryer* was heard on appeal before the Lord Chancellor *Chelmsford* in November, 1867, and on the 3rd of December in that year (6) His Lordship gave judgment, reversing the decree of the Vice-Chancellor, and holding that a residuary devise of land is just as specific under the *Wills Act* as it was before.

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(1) 1 Dr. & Sm. 236.

(2) Law Rep. 2 Eq. 627.

(3) 26 Beav. 465. 5 Jur N.S 402

(4) 34 Beav. 302.

(5) 2 Giff. 130. 6 Jur N.S 1337

(6) Law Rep. 3 Ch. 420.

It being thus settled that a residuary devise of real estate is still specific, the rights of the parties claiming under this will are just the same as if the *Heyford* estate, instead of passing under the residuary devise, had been specifically devised by name to the Plaintiff and the infant Defendant, from which it follows that the *Bugbrooke* and the *Heyford* estates must bear the mortgage debt rateably. There must, therefore, be a reference to make the apportionment, the parties being incapable of binding themselves as to the amount.

The decision of the Master of the Rolls in *Brownson* v. *Lawrance* (1), was much pressed upon me to shew that the devisees of the *Heyford* estate are bound to exonerate the devisee of *Bugbrooke* from the mortgage debt. That decision evidently proceeded on the ground that a residuary devise of land was not specific, as His Lordship himself had decided in the two cases of *Rotherham* v. *Rotherham* (2) and *Bethell* v. *Green* (3), to which I have before referred; and though *Brownson* v. *Lawrance* was decided three months after Lord *Chelmsford* had reversed the decision of Vice-Chancellor *Kindersley* in *Hensman* v. *Fryer* (4), and had thereby overruled *Rotherham* v. *Rotherham* and *Bethell* v. *Green;* and though the decision of Lord *Chelmsford* was cited, he did not advert to it in his judgment; I am satisfied that his decision would have been different if he had considered that case, for it settles that an estate passing by a residuary clause is specifically devised, and consequently takes away the ground of the decision. I cannot, therefore, treat that case as an authority in favour of the contention of the Defendant *James Bazeley.*

It was also contended that the mortgage deed of the 26th of July, 1845, made the *Heyford* estate the primary fund for the payment of the mortgage debt, but I cannot accede to that argument. It was beyond the scope and object of that deed to settle such a question, and it could not do so without an express contract, which it certainly does not contain. There being no charge of debt or legacies on the real estate in this will, the numerous

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(1) Law Rep. 6 Eq. 1.

(2) 26 Beav. 465. Sm. n.S. 402

(3) 34 Beav. 302.

(4) Law Rep. 2 Eq. 627.

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authorities which were cited on the subject of marshalling have no application, and it is unnecessary to refer to them more particularly.

The only remaining point for decision is as to the right of the assignees in bankruptcy of *Thomas Gibbins* to the estate, as tenant by the curtesy, in the moiety of the *Heyford* estate, to which he became entitled upon the death of the tenant for life of that estate on the 1st of December, 1867. He became bankrupt in April, 1866, and obtained his discharge on the 1st of July in that year. His wife was, therefore, tenant in fee in remainder only when he obtained his discharge. There is no doubt that all rights and interests in property, vested and contingent, to which a bankrupt is entitled at the time of his bankruptcy, pass to his assignees. The cases cited by Mr. *Osborne* shew that clearly. But there can be no inchoate right to curtesy till the wife becomes entitled to an estate of inheritance in possession, and as the wife of *Thomas Gibbins* did not become entitled to such an estate till the 1st of December, 1867, more than a year after his bankruptcy and discharge, I am of opinion that his inchoate right first accrued to him then, and that his assignees are consequently not entitled to the estate for his life to which he became entitled in possession upon the death of his wife on the 1st of July, 1868.

I think this case is in principle the same as *In re Inkson's Trusts* (1).

Solicitor for the Plaintiff: Mr. *C. V. Field.*

Solicitors for the Defendants: Messrs. *Duncan & Murton.*

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(1) 21 Beav. 310.

ATTORNEY-GENERAL *v.* EARL OF LONSDALE.

V.-C. M.
1868
May 27;
June 6–12;
Dec. 22.

4 Ex. 383.
10 Eq. 238,
9 Ch 430
2 App Cas 861

Riparian Proprietors—Tidal Navigable River—Private and Public Injury.

An information and bill was filed by the Plaintiff, a riparian proprietor on a tidal navigable river, to restrain the Defendant, an opposite riparian proprietor, from constructing a jetty in the *alveus* of the river so as to injure the Plaintiff's property and interfere with the navigation:—

Held, that a riparian proprietor had no greater right to use the *alveus* of a tidal than a non-tidal river, and that although the Plaintiff had proved no serious injury to his property, he was entitled to an injunction:

Held, also, that the suit being by information and bill was properly framed in respect of the private and public wrong complained of.

THIS was an information and bill filed by the Attorney-General at the relation of Mr. *Mounsey* against the Earl of *Lonsdale*. The Plaintiff, Mr. *Mounsey*, was the owner of an estate of considerable value called the *Rockliffe* demesne, on the north or right bank of the river *Eden*, and the Defendant was the owner of an estate, also of considerable value, on the south or left bank of the river, both properties lying a few miles below *Carlisle*. The river *Eden* is a tidal river, rising in the *Westmoreland Hills*, passing through the town of *Carlisle*, and between the properties of the Plaintiff and Defendant, and emptying itself into the *Solway Firth*. The course of the river as it ran between these two properties was from east to west. At this point it was stated to flow with considerable force, so much so, that it had at all times caused a washing away or encroachment upon the lands of both the Plaintiff and Defendant. For the purpose of preventing this mischief, the Plaintiff and his predecessors in title had been in the habit of erecting or constructing protective works, or, as they were called, bulwarks, on his land, and the Defendant and his predecessors in title had erected protective works for the purpose of preventing his land from being washed away by the tide. The Plaintiff asserted that his protective works had been wholly erected on his own land without interfering with the *alveus* or bed of the river; but it was admitted that the Defendant and his predecessors had at various times erected jetties or piers on their side of the river, which had projected a considerable distance into its bed. The breadth of the river between the estates of the Plaintiff and

S.C. on appeal 10 Eq. 557, 6 Ch 141.

Defendant was from 190 to 200 yards at high water. Complaints had at various times, for many years past, been made by the Plaintiff of the encroachments of the Defendant on the bed of the river, which he considered had had the effect of throwing the water with greater violence upon his land, and thereby destroying it to a greater extent than it would have been destroyed or washed away simply by the natural flow of the tide; but no proceedings had been taken to prevent that encroachment until the institution of this suit, which was commenced in consequence of the Defendant proceeding to construct a new jetty for the protection of his land, which it was proposed to project 100 yards, or thereabouts, into the bed of the river. The original bill was filed by the Plaintiff alone on the 6th of October, 1864, which, after setting out at length the injurious effects which the Plaintiff apprehended from the Defendant's works, prayed an injunction to restrain the Defendant from continuing or completing the construction of his new bulwark or jetty in the tidal bed of the river *Eden*.

This was followed by a motion for an injunction in the terms of the prayer of the bill, which was heard before the Vice-Chancellor Sir *R. T. Kindersley* in October, 1864. The result of that motion was, that it was ordered to stand over till the hearing of the cause. The information and amended bill, which was filed in January, 1865, stated that after the motion for the injunction, the Plaintiff being desirous of avoiding further litigation, made applications to the Defendant and proposed to submit the whole question to the opinion of an independent engineer, by whose decision he would be bound. The Defendant, however, refused to abide by the decision of any one except his own engineer, and required that the effect of the Plaintiff's own works upon the flow of the river should be included in the reference to arbitration.

The Plaintiff's attempts to settle the litigation having failed, the information and amended bill was filed on the 25th of January, 1865. It prayed that the Defendant might be restrained by injunction from constructing or continuing to construct the new bulwark or jetty, or any other work which should have the effect of diverting the tidal or fresh waters of the river *Eden* from their accustomed channels or courses, as the same existed before the new jetty was commenced, so as to injure the Plaintiff's lands, or so as to injure or interfere with the free use and navigation of the river as a public navigable stream or highway; and from allowing the said new jetty to remain in the bed or channel of the river so as to obstruct such water, or such free use and navigation of the stream, or otherwise to the injury of the Plaintiff.

The answer of the Defendant was filed the 11th of July, 1865. It complained of the injurious effects of the Plaintiff's works on the Defendant's lands, set out the changes which had from time to time been produced on the Defendant's estates by the force of the tide, and justified the erection of the jetty in question as a proper protection to the Defendant's estate. It was submitted that the Defendant was justified in law in arresting the flow of the tide, and it was denied that the new jetty was injurious either to the Plaintiff's land or to the navigation of the river.

There was a considerable amount of evidence, both on the part of the Plaintiff and the Defendant, consisting of affidavits made by some of the most eminent engineers, seafaring men, and others well acquainted with the particular locality, and with the general effect of river works erected for the protection of the banks of rivers and for diverting the flow of tidal streams. The evidence for the Plaintiff represented that the new jetty was calculated to produce, and had produced, a serious amount of injury to the Plaintiff's land, and had impeded and interfered with the navigation of the river to a very dangerous extent. On the other hand, it was represented by the Defendant's witnesses that the new jetty had no effect whatever in producing any injury to the Plaintiff; but, on the contrary, that the Plaintiff's bulwarks were more calculated to injure the Defendant's property; that the Defendant's new jetty was erected solely for the protection of the land on his side of the river, and that instead of its being carried out too far it was, on the contrary, not extensive enough, and that the navigation of the river was in no degree injured by the jetty. It was also alleged that the traffic upon the river had almost ceased, in consequence of the railways in the neighbourhood, and other local causes.

Sir *Roundell Palmer*, Q.C., Mr. *Glasse*, Q.C., and Mr. *Mounsey*, in support of the information :—

This case is rested on two grounds, private and public rights.

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On the question of private rights, the case is governed by *Bickett* v. *Morris* (1), where it was held that the soil of the *alveus* was not the common property of the respective owners on the opposite sides of a river. The share of each owner belongs to him in severalty, and extends *usque ad medium filum aquæ,* but neither is entitled to use it in such a manner as to interfere with the natural flow of the stream. A fence, or bulwark, on the bank is allowable, but the *alveus* is sacred, and it is not necessary to prove that damage has been sustained or is likely to be sustained. *Farquharson's Case* (2), cited in *Bickett* v. *Morris,* also lays it down that although a riparian proprietor may build a fence to fortify his land against the encroachments of a stream he may not encroach upon the *alveus.* To the same effect is the decision in *Magistrates of Aberdeen* v. *Menzies* (3); and the law is even more authoritatively stated in *Menzies* v. *Earl of Breadalbane* (4).

Although the evidence in this case is somewhat contradictory, there is sufficient uncontradicted evidence to shew that the Defendant has built and is continuing a solid wall into the *alveus* of the river, which has the effect of doing a certain amount of injury to the Plaintiff's soil.

Then as to the public right, in support of which the Attorney-General files the information, there is evidence to shew that the navigation of the river is obstructed and interfered with. It is said that there is not so much traffic as there formerly was; but the public have a right to the maintenance of the navigation both now and for the future. The *Eden* has always been a navigable river, and ought to be maintained as such.

It is shewn in the case of *Miles* v. *Rose* (5) that the flux and reflux of the tide is *primâ facie* evidence of a navigable river; and it is laid down in *Williams* v. *Wilcox* (6) that there is no right to erect a weir which shall obstruct any part of the stream. By the common law, there is a right of passing in the channel of a river which is paramount to the right of the Crown. The channel of a public navigable river is the King's highway; and in *Attorney-*

12 Jur. N.S. 803

(1) Law Rep. 1 H. L., Sc. 47.
(2) 7 Morr. Dict. 12, 787.
(3) Ibid. 12, 788.
(4) 3 Wils. & Shaw 235; 3 Bli. (N.S.) 414.
(5) 5 Taunt. 705.
(6) 8 Ad. & E. 314.

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General v. *Johnson* (1) it was held to be immaterial to whom the soil belonged, it not being competent either for the Crown or a subject to use it for any purpose amounting to a nuisance.

Mr. *Jessel*, Q.C., Mr. *Wickens*, and Mr. *Davey*, for the Defendant:—

The first objection is, that as the pleadings now stand the Court cannot give relief. The second objection is, that *Bickett* v. *Morris* (2) has no application to the case of a public highway, but is confined to the right of private property. The third objection is, that when there is no considerable damage proved to have been caused, it is not the province of the Court of Chancery to interfere by injunction.

As to the first proposition, this case comes on upon information and bill, the Attorney-General complaining of an injury to the highway, and the Plaintiff complaining that the Defendant has done an injury to his land, and also seriously injured the navigation. The information is confined to the public; but the Plaintiff's charges extend to his own property, and to the injury he himself more particularly sustains by the damage to the navigation. Whether or not the two cases can be combined in the form they now are, the evidence must, at any rate, be kept distinct. Again, the two questions are distinct in this respect, that in a tidal river the soil is in the Crown, and if there is a nuisance, that is a question between the Crown and Lord *Lonsdale*, and in that case the Attorney-General must represent the Crown, and not come on behalf of the public. But if the soil is not in the Crown, then the Attorney-General sues on behalf of the public, and the question is, nuisance or no nuisance; and we say there is no proof of public nuisance here which will entitle the Court to interfere. The information does not assert the right of the Crown to the soil of the river, but it rests upon the ground of interference with the navigation.

The case of *Bickett* v. *Morris* was a very special one, and arose with respect to a stream which was non-tidal, and therefore it does not govern a case of this kind, and even there the injury was so slight that this Court would not have interfered by injunc-

(1) 2 Wils. 1 C. C. 87.

(2) Law Rep. 1 H. L., Sc. 47. 12 Jur. N.S. 803.

tion. That case came on upon appeal from a decision in a Scotch Court.

Then on the third proposition, we say that it is not shewn that there is any actual damage caused to the Plaintiff's property. The Plaintiff's land has been wearing away for a considerable time, but there is no evidence to prove that this wearing away is caused by the new jetty. But even if the Court should be of opinion that the balance of evidence is against the Defendant, that is, that there is some appreciable damage, yet it is of so slight a nature that the Court will not interfere by an injunction, and, *à fortiori*, not by a mandatory injunction. So small a damage is shewn that it might be compensated by an action at law. But it is further submitted, that the place in question is what in law is considered an estuary or arm of the sea, since the tide runs up to the *locus in quo*, and, according to the law as decided in *Reg.* v. *Pagham Commissioners of Sewers* (1), a man may erect any works he finds necessary for the protection of his own land against the sea notwithstanding that an injury may thereby be caused to his neighbour's land. In *Viner's* Abr. "Prerog. of the King" (2), it is stated that every water which flows and reflows is called an arm of the sea so far as it flows. Such river participates of the nature of the sea, and is therefore said to be an arm of the sea. The Defendant was, consequently, justified in erecting this jetty, which is proved to be for the protection of his land from the encroachments of the tide.

Then as regards the right of the Attorney-General to file an information, the rule is, that it is not for every case of nuisance that the Court will interfere. If the Attorney-General filed the information upon an allegation of a scheme concocted by the Defendant or his predecessors in title to rob the Plaintiff of his land so as to increase his own property, which is part of the Plaintiff's allegations, then there is no case of that kind substantiated, and it would not be a case for an information. But if the Attorney-General sues as for a nuisance, then the Crown must prove there is a nuisance, which is not proved here.

In *Attorney-General* v. *Cleaver* (3) it was held that the jurisdiction of the Court by injunction against a nuisance would not be

(1) 8 B. & C. 355.

(2) Vol. xvi. p. 574, B. A. plac. 5.

(3) 18 Ves. 211.

exercised without a trial at law, the remedy for a public nuisance, as between the Crown and an individual, being by a criminal information by the Attorney-General. The same principle was acted on in *Attorney-General* v. *Burridge* (1); and in *Rex* v. *Russell* (2) it was held to be a proper direction to a jury upon the trial of a question of nuisance in a navigable river, to acquit the Defendant if it was beneficial to the public.

Hale's Treatise *De jure Maris* (3), confirms this view, where he says:—"An erection in a river is not to be deemed a nuisance simply because it infringes on the water highway:" *Rex* v. *Ward* (4), and *Brown* v. *Gugy* (5), follow the same doctrine.

To support an application for an injunction it is necessary for the Plaintiff to shew a substantial damage arising from the violation of a legal right, and until this is established at Law, the Court will not interfere by injunction: *Holyoake* v. *Shrewsbury and Birmingham Railway Company* (6); *Wintle* v. *Bristol and South Wales Railway Company* (7); *Attorney-General* v. *United Kingdom Electric Telegraph Company* (8).

Sir *Roundell Palmer*, in reply:—

The argument may be divided under three heads:—First, as to the grounds upon which the Court grants an injunction; secondly, as to public rights; and thirdly, as to private rights. On the first head, the Court never refuses an injunction at the hearing on grounds such as are here alleged; though upon an interlocutory application it frequently refuses an injunction on the balance of convenience. Even in *Attorney-General* v. *Sheffield Gas Consumers Company* (9) one Judge, Sir *J. Knight Bruce*, thought there was a case for an injunction, and it was refused only on the grounds of acquiescence, and that the nuisance was of a temporary nature; but there is no authority for refusing an injunction to restrain a permanent nuisance, for which a series of actions would be no sufficient remedy. In *Attorney-General* v. *United Kingdom Electric Telegraph Company* the nuisance was infinitesimal, and the legal nuisance

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(1) 10 Price, 350.

(2) 6 B. & C. 566.

(3) Page 85.

(4) 4 Ad. & E. 384

(5) 10 Jur. (N.S.) 525; 2 Moo. P. C. (N.S.) 341.

(6) 5 Railw. Cas. 421.

(7) 10 W. R. 210.

(8) 30 Beav. 287. 8 Jur. N.S. 588

(9) 3 D. M. & G. 304. 17 Jur. 677

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had not been proved; but if the legal right had been established an injunction would have been granted. In *Wood* v. *Sutcliffe* (1) Vice-Chancellor *Kindersley* thought that there was no appreciable nuisance to the Plaintiff, and that there had been acquiescence. In *Tipping* v. *St. Helen's Smelting Company* (2), and in *Crossley* v. *Lightowler* (3), it was held that it was unnecessary to prove actual permanent damage if it could be shewn that the Defendant was interfering with the rights of the Plaintiff, because if he allowed it to continue the Defendant might obtain a right by acquiescence or prescription. As to public rights—the suit was originally commenced by bill; but in consequence of the Defendant's objections it was brought before the Attorney-General, and an information was filed. The Defendant says the navigation is not now used, but that does not justify him in interfering with the river so as to prevent its ever being used for navigation. It is for the Attorney-General to prevent any obstruction, for the benefit of the public, for no one can say that the river may not be required, and if the Defendant is not restrained he might acquire a prescriptive right. The *quantum* of user is quite immaterial on a question of injunction. In *Attorney-General* v. *Rickards* (4) an obstruction in a harbour of much less extent than this was restrained; and in *Attorney-General* v. *Parmeter* (5) it was established that the King cannot affect by grant the rights of subjects using a highway over waters. The same thing was decided in *Attorney-General* v. *Johnson* (6). As to *Rex* v. *Ward* (7), the original building was not in the bed of the river, and the additional erection was not nearly so great as in this case. That case was overruled by *Rex* v. *Russell* (8); but in *Rex* v. *Russell* there was no question as to private convenience of individuals. The case of *Reg.* v. *Betts* (9) only decided that a jury might find that a bridge was not necessarily a nuisance. The evidence in this case clearly proves that there is a navigation in this river, and that it is used by the public.

On the third point, as to interference with private rights, *Bickett* v. *Morris* (10) is a conclusive authority where, as in this

(1) 2 Sim. (N.S.) 163.
(2) Law Rep. 1 Ch. 66.
(3) Ibid. 3 Eq. 279; 2 Ch. 478.
(4) 2 Anstr. 603, 615.
(5) 10 Price, 378, 412.
(6) 2 Wils. C. C. 87, 101.
(7) 4 Ad. & E. 384.
(8) 6 B. & C. 566.
(9) 16 Q. B. 1022.
(10) Law Rep. 1 H. L., Sc. 47. 12 Jur
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case, there is proof of actual personal injury. As to the alleged distinction between a tidal and non-tidal stream, the difference is wholly imaginary, and, if anything, the injury is greater upon a tidal river. It would be absurd to suppose that a line could be drawn at the termination of a tidal stream, such, for instance, as *Teddington* upon the *Thames*, above which a riparian proprietor should have rights which one below would not have. The right established by *Bickett* v. *Morris* (1) is to have the banks protected, and that right applies, *à fortiori*, to the banks of a tidal river.

In *Brown* v. *Gugy* (2) the building was on the Defendants' own bank for its protection; but had it encroached upon the river an injunction would have been granted; and in *Attorney-General* v. *Pagham Commissioners of Sewers* (3), the Defendants had only fortified their own banks to prevent the tide from encroaching where it had never come before. Here the obstruction prevents the water from flowing where it always has flowed. That distinction is clearly pointed out in *Rex* v. *Trafford* (4). The Defendant's argument goes to this length, that a riparian owner on a tidal river may do whatever he likes opposite his own bank so long as he leaves some channel. As to the Defendant's jetty being a mere protection, it is, on the contrary, an immense work, all built in the *alveus* of the river, extending eighty-eight yards, and but for this suit it would have been carried out much further.

Dec. 22. SIR R. MALINS, V.C.:—

This cause was most ably and elaborately argued on both sides before the Long Vacation, the arguments extending over more than eight days. [His Honour then stated the facts of the case.]

The Plaintiff's case is rested on the ground, first, of the injury to the Plaintiff's property caused by the erection of the jetty; and, secondly, the obstruction or injury to the navigation of the river.

The first question, therefore, is as to the extent of injury which the Plaintiff has sustained, or is likely to sustain, from the erection of the jetty.

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(1) Law Rep. 1 H. L., Sc. 47. 12 Jur NS 1063

(2) 2 Moo. P. C. (N.S.) 341. 10 Jur NS. 325

(3) 8 B. & C. 355.

(4) 1 B. & Ad. 874, 888.

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On this point the evidence is, as might be expected, most conflicting. On the part of the Defendant it is sworn that it is absolutely impossible that the Plaintiff can have sustained any injury from the jetty; and on the part of the Plaintiff it is sworn that the inevitable effect of it must be to throw the tidal waters upon the Plaintiff's lands with such additional force that they will be washed away and destroyed to such an extent as has never been before experienced, and that the jetty will thus be most injurious to the Plaintiff.

There is a great mass of evidence, which is, in fact, much overlaid on both sides. [His Honour then read extracts from the affidavits.]

In this remarkable conflict of evidence I am obliged to look at the probabilities of the case, and, applying the principles of common sense, form the best opinion I can from the evidence on both sides; and considering that the Plaintiff has, by his own admissions, always been subject to a gradual washing away of parts of his land, I arrive at the conclusion that although the new jetty has a tendency to throw, and probably does throw, the tidal waters upon the Plaintiff's land with somewhat greater force than they were thrown before it was erected, yet, considering that the jetty does not extend to quite so much as one-third of the width of the river at high water, and that every ton of water which it impedes or displaces is thrown into contest with at least two tons which continue in their natural flow, I am not satisfied that the extent of injury sustained or likely to be sustained by the Plaintiff in consequence of the erection of the jetty is or will be such as would call for the interference of this Court if the Plaintiff's case rested solely upon this ground.

I think the Plaintiff's evidence also fails to shew that his land has been washed away to a materially greater extent since the erection of the jetty than it was before. If, therefore, the Plaintiff's case had rested on this ground alone, I should probably have arrived at the conclusion that he had not proved a case of such material injury to his property as would justify the interference of this Court according to the rule laid down in *Attorney-General* v. *Sheffield Gas Consumers Company* (1), and many other cases.

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(1) 3 D. M. & G. 304. 17 Jan 677

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But the case does not rest merely on the actual extent of injury sustained or likely to be sustained by the Plaintiff. He is a riparian proprietor, and has all the rights of such a proprietor in this river. The Defendant is the opposite riparian proprietor, and has no greater rights than other such proprietors.

Supposing this not to be a tidal river, or that the rights of riparian proprietors on tidal and non-tidal rivers are the same, the law is now settled that no riparian proprietor can, without the consent of the opposite proprietor, erect any building or make any change in the *alveus* of a river. On this point the recent case of *Bickett* v. *Morris* (1) is conclusive. The same law was laid down by the House of Lords in *Menzies* v. *Earl of Breadalbane* (2), and hurl Lord ~~*Eldon*~~ there said it was not competent for the proprietors of land on either side of a river to disturb the ordinary course of the stream to the prejudice of the opposite proprietor; the ordinary course of a river being that which it takes at ordinary times.

Unless, therefore, the fact of the *Eden* being a tidal river distinguishes the present case, these authorities are conclusive against the Defendant, for it is admitted that his jetty is a solid pier extending eighty-eight yards obliquely and fifty-three yards perpendicularly into the *alveus* of the river.

Does, then, the fact of the river being a tidal one make any difference? I am of opinion that it does not. It was strongly contended by the counsel for the Defendant that the place where the jetty is erected is an estuary, and therefore an arm of the sea, and that the Defendant has, consequently, all the rights of protecting his land which he would have had if it had been on the sea-shore instead of the river *Eden*, and *Rex* v. *Pagham Commissioners of Sewers* (3) was cited to shew that a proprietor of land on the sea shore has a right to erect any works he thinks proper, for the purpose of protecting it against the inroads of the sea, though such works may be injurious to a neighbouring proprietor, and that case is undoubtedly authoritative on that subject.

This would have been conclusive for the Defendant if his land had been on the sea shore; but is this principle applicable to a riparian proprietor on a navigable river? It must be borne in mind

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(1) 12 Jur N.S. 803 Law Rep. 1 H. L., Sc. 47. (2) 3 Bli. (N.S.) 414. 3 Wilson & Shaw 235.
(3) 8 B. & C. 355.

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that the greatest work of man must be insignificant as compared with the power of the sea, but that this is not so with reference to a navigable river. If the principle contended for were sustainable, it would follow that every riparian proprietor on a navigable river, however distant from the sea, and however gentle the flow of the tide at the place, might throw any works into the *alveus* that he might deem necessary for his protection, however injurious such works might be to the adjoining or opposite proprietor; and thus, taking the *Thames* for an example, any riparian proprietor between *Vauxhall Bridge* and *Teddington*, where the tide ceases, might, by such works, obstruct the navigation at his pleasure, because the *Thames* is there a tidal river, and therefore an estuary or arm of the sea. In a sense, there is no doubt that every water which flows and reflows is called an arm of the sea, as stated in *Vin.* Abr. "Prerog. of the King" (1). But I find no authority for the proposition contended for; on the contrary, all the cases, including those cited by the Defendant's counsel, tend in the opposite direction. In both the cases of *Rex* v. *Russell* (2), and *Rex* v *Ward* (3), the rivers, the *Tyne* and *Medina*, in which the navigation was impeded, were tidal rivers, and it does not appear to have been suggested, either at the Bar or by the Bench, that the parties indicted for the nuisances had any greater right in these rivers than they would have had if they had been non-tidal. The same principle was acted upon in *Attorney-General* v. *Johnson* (4).

I am, therefore, of opinion, upon principle and authority, that a riparian proprietor on a tidal or navigable river has no greater rights against an adjoining or opposite riparian proprietor than such a proprietor on a private or non-tidal river, and that the Defendant cannot therefore justify the erection of the jetty in question on this ground.

It was then contended that the soil of all navigable rivers being, as it unquestionably is, in the Crown, the Defendant, as a grantee of the Crown, which is implied by acts of ownership, is entitled to the soil of this river at the point in dispute, and that such ownership justified the erection of the jetty, it being done upon his own soil. The evidence, I think, establishes, or it may, at all events,

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(1) Vol. xvi. p. 574, B. A. pl. 5.

(2) 6 B. & C. 566.

(3) 4 Ad. & E. 384.

(4) 2 Wils. C. C. 87.

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be assumed for the purposes of this suit, that the soil of the river is in the Defendant, but it is, in my opinion, clear that such ownership affords no justification for what he has done.

In *Williams* v. *Wilcox* (1) Lord *Denman* said it was clear that the channels of public navigable rivers were always highways up to the point reached by the flow of the tide, and the soil was presumably in the Crown; and above that point, whether the soil at common law was in the Crown, or in the owners of the adjacent lands, there was at least a jurisdiction in the Crown, according to Sir *Matthew Hale*, to reform and punish nuisances in all rivers whether fresh or salt: *De jure Maris* (2).

In *Attorney-General* v. *Burridge* (3), the decision was, that a grantee of the Crown, or the Crown itself, had no authority to erect buildings between high and low water which might impede the navigation of the river. The same principle was established in *Attorney-General* v. *Parmeter* (4); and in *Reg.* v. *Betts* (5) it was only on the ground that the jury found the erection of a bridge on the river *Witham*, a navigable river, not to be a nuisance, that the indictment was not sustained. A navigable river was a highway, but it was very properly left to the jury to say whether the erection of a bridge on the bed of it was a nuisance, and they said it was not. *Attorney-General* v. *Johnson* (6) goes to the same point.

It was not disputed, and could not be, by the Defendant's counsel, that the *Eden* is a navigable river, but it is said that the traffic upon it has so much diminished in consequence of the construction of railways in the neighbourhood that the navigation is no longer to be regarded as of importance. I am, however, bound to regard the river as a highway which all Her Majesty's subjects are entitled to use whenever it may suit their convenience, and events which it is impossible to calculate upon may add to the use of the river navigation, which is now, undoubtedly, trifling, and it may become of very great importance. In addition to these considerations, the evidence of the Plaintiff proves that there is even now a traffic which renders its preservation as a public highway by no means unimportant. The Plaintiff himself states in his affidavit that

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(1) 8 Ad. & E. 314.
(2) Part 1, cap. 2.
(3) 10 Price, 350.
(4) 10 Price, 378.
(5) 16 Q. B. 1022.
(6) 2 Wils. C. C. 87.

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he has always used the river for the conveyance of stones and materials for his estates, and it would at times be a very great inconvenience and hardship to him if the navigation of the river were so seriously interfered with as to deter ship or barge owners from coming up the river. The same thing is shewn by the affidavit of Mr. *Boyd*, who speaks of the navigation being of very considerable importance, and *George Irving*, a master mariner, confirms this statement, and says, with regard to the new jetty, that it is far more dangerous to the navigation of the river than the two jetties previously erected, not only by reason of the greater danger of getting foul of it, but also by reason of the derangement and destruction it causes in the flow of the tide up the river; that for vessels going up higher, as to *Rockliffe* and parts above, it was now perilous, and might well prevent any from venturing higher. This witness also says that the Plaintiff's works do not interfere with him.

The navigation, therefore, is, in my opinion, shewn to be of importance, and I am of opinion that the Plaintiff has a clear right to have it maintained.

I think the suit is properly constituted for the purpose of preventing the continuance of the public and private injury of which the Attorney-General and the Plaintiff complain. The Plaintiff might perhaps have maintained the suit without the Attorney-General on the principle of *Spencer* v. *London and Birmingham Railway Company* (1), on the ground that the Act complained of, although a public nuisance, causes a particular injury to himself. I had occasion to consider this point in *Cook* v. *Corporation of Bath* (2), and therein I followed the decision in *Spencer's Case*, and held that the Plaintiff had a right to sue without the Attorney-General in respect of a public nuisance which was also a particular injury to himself.

Being, therefore, of opinion that the various justifications set up by the Defendant for the erection of the jetty in question fail, I think the Plaintiff is entitled to the relief he asks, and must have a decree in substance according to the prayer of the bill. Although I do not think that the Plaintiff has established a case of very material injury, yet as he is in strictness entitled to the relief he

(1) 8 Sim. 193.

(2) Law Rep. 6 Eq. 177.

asks, and as the Defendant persisted in proceeding with the erection of the jetty notwithstanding the repeated remonstrances of the Plaintiff, and the very reasonable offer made by him to refer the matter to an independent engineer, I do not see any ground on which I can relieve the Defendant from the costs of the suit, and he must therefore pay them. I must add, that although the Defendant has made many objections to the defensive works, or bulwarks, of the Plaintiff, I am satisfied that they have not been materially enlarged or altered for much more than twenty years; that they do not in any way interfere with the natural flow of the tide; and it was not, therefore, in my opinion, reasonable on the part of the Defendant's agents to insist, as they did in answer to the Plaintiff's proposal for a reference, on questions as to those works being referred to arbitration.

Solicitors for the Relator: Messrs. *Gray, Johnston, & Mounsey.*
Solicitors for the Defendant: Messrs. *Ellis & Ellis.*

BEYFUS *v.* BULLOCK.

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Feb. 9.

Bankruptcy—Deed to defeat Creditors—Lis pendens—2 & 3 Vict. c. 11.

By deed, a father and son settled certain real estate to the use of the father for life, and after his decease to the use of the son, if then living, in fee; and a power was reserved to the father and son of revoking the uses and appointing new uses. By a subsequent deed, the son being at the time insolvent, the father and son revoked the old uses in favour of the son, and appointed the estate to such uses as the father should appoint, and in default of appointment to the use of the son absolutely. The son was afterwards adjudicated bankrupt, and a bill was filed by the creditors' assignees to set aside the latter deed as fraudulent.

Upon a motion in the cause an injunction was granted, restraining the father until the hearing from exercising his power under the deed in favour of a purchaser for value, but without interfering with the exercise of his power in favour of volunteers.

In such a case registration of the suits as a *lis pendens* under 2 & 3 Vict. c. 11, would not be a sufficient protection to creditors.

BY a deed-poll, dated the 20th of December, 1866, *Benjamin Bullock,* and *William Bullock* his son, appointed certain real estates to the use of *B. Bullock* for life, and after his decease it was appointed and declared that in case *W. Bullock* should be living at the decease of *B. Bullock*, then the said hereditaments should, as from his decease, be to the use of *W. Bullock*, his heirs and assigns. And it was provided that it should be lawful for *B. Bullock* and *W. Bullock*, at any time during their joint lives, by deed absolutely to revoke all or any of the uses, trusts, powers and provisions thereinbefore limited and declared, and by the same or any other deed to limit and declare such other uses, powers, and provisions of or concerning the settled hereditaments, as they should think fit.

On the 19th of December, 1867, *B. Bullock* and *W. Bullock*, who was at the time insolvent, executed another deed-poll, whereby they purported wholly to revoke all the uses, powers, and provisions directed and declared in the deed of December, 1866, to, or to the use of, *W. Bullock*, his heirs and assigns, and by the same deed to appoint and declare that all the settled hereditaments appointed and declared by the deed of 1866 should remain, and be to such uses as *B. Bullock* should, by deed or will, appoint, and in default of appointment, to the use of *W. Bullock* absolutely.

On the 9th of May, 1868, *W. Bullock* was adjudicated a bankrupt, and the Plaintiffs were appointed creditors' assignees in the bankruptcy.

The bill was filed by the assignees for the purpose of having the deed of the 19th of December, 1867, set aside as fraudulent and void as against the creditors, and it prayed that in the meantime, and until further order, the Defendant *B. Bullock* might be restrained by injunction from exercising the power of appointment purported to be given him by the deed in question.

Mr. *Cotton*, Q.C., and Mr. *Kisch*, for the Plaintiffs, now moved for an injunction in the terms of the prayer:—

It is in the power of the father, by means of the deed which is now impeached, to convey the legal estate in such a manner as to defeat the Plaintiff's rights; and we therefore ask that he may be restrained until the hearing from exercising the power of appointment contained in that deed in favour of a purchaser for value, but we do not ask the Court to restrain the exercise of the power in favour of volunteers.

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Mr. *Glasse*, Q.C., and Mr. *Boyle*, for the Defendants:—

The Act 2 & 3 Vict. c. 11, as to the registration of a *lis pendens*, is a sufficient protection to the Plaintiffs; and this being so, it is unnecessary for the Court to interfere in the present case. There has been no case since the Act, in which such an injunction as this has been granted. [They referred to *Jones* v. *Winwood* (1).]

SIR R. MALINS, V.C.:—

This motion involves a question of great importance.

The deed of December, 1867, is now impeached on the ground that it is fraudulent as against the creditors and assignees of the son. All that is necessary for me now to say is, that there is something to be decided in the suit. If I see on the allegations in the bill that there is a question to be tried at the hearing, however unimportant it may be, it is my duty to extend the usual protection of the Court to the property in the meantime. That deed would give the father power to settle the estate upon any of his family, or to convey it away to a stranger for valuable consideration. Now it would be inequitable that the father should be restrained from exercising the power in favour of his own family, because he might die before the question as to the validity of this deed is decided, and a great injustice might be done to other members of his family. On the other hand, it would be unjust to the Plaintiffs if he were allowed to exercise his power so as to dispose of the estate for value, as in that case, whether the Plaintiffs would be able to establish their rights or not against a purchaser, they would have another party to introduce into the bill, and other interests to contend with.

The argument is, that the registration of a *lis pendens* under the the Act of 2 & 3 Vict. c. 11, would be sufficient protection to the Plaintiffs; but that appears to me to be a very doubtful protection, because it may be so registered as not to give any notice of the real object of the suit as affecting this property, and I think that is not a ground to prevent me from giving relief.

Under these circumstances, I think that the order may be so modified as to give the relief that is sought, that is to say—the father should be restrained from making any alienation of the

(1) 3 M. & W. 653.

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estate in favour of a purchaser for valuable consideration, but the order is not to interfere with the exercise of all the powers he may have under the deed in favour of volunteers.

The costs will be costs in the cause.

Solicitors for the Plaintiffs: Messrs. *Sydney & Son.*

Solicitors for the Defendant: Messrs. *Treherne & Wolferstan.*

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1868
Nov. 5, 6, 7.

WHITE *v.* BRITISH EMPIRE MUTUAL LIFE ASSURANCE COMPANY.

Policy of Assurance—Suicide, Condition against—Exception of bonâ fide Interests in other Persons—Assignment to Assurance Company.

An assurance company advanced money to *W.* on a mortgage of real security, and on his effecting a policy on his life in their office for the amount of the loan, which was deposited with the company as collateral security. The policy contained a condition that if the assured died by his own hands, by the hands of justice, or by duelling, the policy should be void, except to the extent of any *bonâ fide* interest therein which at the time of such death should be vested in any other person or persons for a sufficient pecuniary or other consideration. *W.* committed suicide under temporary insanity while the policy was in the hands of the company:—

Held, that the company and the assured stood in the same position as if the policy had been mortgaged to any third person; that the company came within the exception in the condition; and therefore that the policy was valid to the extent of the mortgage debt due to them at the death of the insured.

In November, 1862, *Horatio White*, being desirous of obtaining the loan of £1000, applied to the Defendant assurance company to advance him that amount. This the assurance company agreed to do on his effecting an assurance in their office on his life, or upon his attaining the age of sixty years, for £1000, securing the same £1000 by a mortgage of real security, and depositing with the company the policy for £1000 so effected in their office by way of equitable mortgage, which was accordingly done.

The policy of assurance was in the ordinary form, and was granted subject to certain conditions indorsed thereon, the one on which the present question arose being as follows:—

"Should any person assured, separately or jointly, die by his or her own hands, by the hands of justice, or by duelling, before the policy shall have been in existence three years, the policy in every such case shall become void, except to the extent of any *bonâ fide* interest therein which at the time of such death shall be vested in any other person or persons for his, her, or their own benefit, for a sufficient pecuniary or other consideration, upon satisfactory proof of the creation, existence, and extent of such interest: Provided that notice of such assignment shall have been received by the company at least one month previous to the death of the assured."

Horatio White, in May, 1864, paid off £300, part of the mortgage debt, leaving £700 due to the company, and in June, 1865 (being within three years from the date of the policy), committed suicide by shooting himself during a period of temporary insanity, that fact having been so found by coroner's inquest.

The company having claimed that the policy was void under the condition by reason of such suicide, and that they were entitled to hold the real estate so mortgaged for the amount due on the mortgage, the widow of the assured, who was also his administratrix with his will annexed, instituted this suit for a declaration that the company were bound to retain in their hands so much of the money secured by the policy of assurance as would be sufficient to satisfy the mortgage debt, and to reconvey to the Plaintiffs the real estate freed from the mortgage.

It was admitted that the real estate mortgaged would alone have been an amply sufficient security for the amount of the mortgage debt.

Mr. *Cole*, Q.C., and Mr. *Hallett*, for the Plaintiff:—

The assurance company comes within the exception in the 7th condition, of other persons having a *bonâ fide* interest for value in the policy, and the company stands in the same position as any third person would have done to whom the policy had been mortgaged: *Solicitors and General Life Assurance Company* v. *Lamb* (1); *Dufaur* v. *Professional Life Assurance Company* (2); *Jones* v. *Consolidated Investment Assurance Company* (3).

(1) 1 H. & M. 716; 2 D. J. & S. 251. 10 Jur NS 580, 139
(2) 25 Beav. 599. 4 Jur NS 841
(3) 26 Beav. 256. 5 Jur NS 214

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[The point was also raised whether the suicide, being during temporary insanity, was within the condition, but it was not pressed.]

Mr. *Glasse*, Q.C., and Mr. *Millar*, for the Defendants:—

The assurance office required the policy, not as a security, but to increase the business and profits of the company. The condition upon which the present question arises was to prevent a fraud upon the company; and although the deposit with the company amounted to a mortgage, it was as a collateral and not as a primary security. The condition was for the protection of the company, and cases might arise where a man about to join in a conspiracy or engage in a duel would insure his life, and it could not be contended that he could by such means save his property. The exception is merely in favour of third persons, and the policy was not intended to repay the money, but merely as a means of extra profit to the company, which would otherwise have charged a higher rate of interest; and, in point of fact, the realty mortgaged being an ample security, the company did not hold the policy within the condition for a valuable consideration.

By the act of suicide the company is defrauded, in so far that thereby the period for payment of the sum assured is accelerated: *Clift* v. *Schwabe* (1).

In *Solicitors and General Life Assurance Company* v. *Lamb* (2) the question was one between third parties, and not, as in the present case, between the parties to the contract.

Sir R. Malins, V.C. :—

It is agreed on both sides, that in the events which have happened, if Mr. *White* had retained the policy in his own hands, it would have been void; and that if it had been deposited for value in the hands of any third person it would have been valid to the extent of any *bonâ fide* interest in such third person; and the question is, whether the assurance company, having advanced money to the assured, and taken a deposit of the policy as a col-

(1) 3 C. B. 437.

(2) 2 D. J. & S. 251. 10 Jur NS 739

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lateral security, the company must be considered as other persons who have acquired an interest in the policy?

In the case of *Solicitors and General Life Assurance Company* v. *Lamb* (1) there was a clause very similar to the one upon which the question arises in this case, and the question as to the nature and effect of such a clause was raised both before Vice-Chancellor *Wood* and the Lords Justices, and Vice-Chancellor *Wood* laid down the rule, which I think is the true rule, that such a condition is for the benefit, not of the office, but of the assured. The Vice-Chancellor said:—"The object of the condition is to increase the value of the policy to the holder: *i. e.*, in the first place, to the assured. And if that be so, I do not see how I can hold, that in the absence of fraud the estate of the assured is to be deprived of the benefit intended to be given to him by the exception, merely because the mortgagee happens to be fully secured." The same rule was adopted by the Lords Justices, who held that the condition was intended for the benefit of the assured, in order to render the policy an available security.

This condition, then, being for the benefit of the assured, and it being admitted that if he had deposited it for value with an indifferent person it would have been valid to the amount of such interest, why should the assured be in a less favourable position because the assurance company have themselves advanced him money, and taken it as a security? If the company desired that under these circumstances the assured should be in a less favourable position than if he had borrowed from a third person, they might have stipulated that the proviso should have no operation while they were mortgagees of the policy. I have heard no reason suggested why the assured should stand in a less favourable position than if he had borrowed from an indifferent person.

But the company made no such provision, and I am of opinion that the assurance company contracted in such a manner as to place them and the assured in the position of mortgagor and mortgagees; that the condition and the exception contained in it were in force when the assured died, and that the moment they agreed to take the deposit they came within the condition that the policy, to the extent of their interest, should be binding.

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(1) 1 H. & M. 716. 10 Jur NS 579

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The policy, therefore, being still in force to the amount of the debt due to the assurance company, that debt must be considered as satisfied, and the securities held by the company must be reassigned. The assurance company must pay the costs of the suit.

Solicitor for the Plaintiff: Mr. *Heathfield Young.*

Solicitors for the Defendants: Messrs. *Watson & Sons.*

In re BURRELL. BURRELL *v.* SMITH.

V.-C. J.
1869
March 9.

Mortgage of Lease—Sub-Mortgage—Disclaimer—Forfeiture of Lease—Claim of Sub-Mortgagee against the Mortgagor's Estate.

B., the owner of a lease of a house, assigned it to *D.* for the residue of the term by way of mortgage to secure £3000 and interest. *D.* sub-mortgaged the debt, and assigned the house for the residue of the term, less three days, to *E.*, to secure £1200 and interest. *B.* died, and in an administration suit against his executors, *D.* and *E.* brought in a claim for £3000. *B.'s* executors assigned their equity of redemption to *D.* *D.* further sub-mortgaged the debt, and assigned the house for the residue of the term, less three days, to *L.*, to secure £1000 and interest. *D.*, by registered deed, assigned all his estate to trustees for the benefit of creditors. *E.* filed a bill against *D.'s* trustees and *L.* for foreclosure; *B.'s* executors not being parties. *D.'s* trustees disclaimed by answer, and *L.* was foreclosed. *E.*, who had been paying the ground rent for some years, at length ceased, and the original lessors entered:—

Held, that *E.* was entitled to prove against *B.'s* estate, which was insufficient, for the whole sum of £3000; but that he was not to receive more than the amount due to him for principal, interest, and costs on the £1200 mortgage debt:

Held, also, that the disclaimer by *D's* trustees extended only to matters in issue in the suit, and did not operate so as to enlarge the estate of the Plaintiff.

THIS was a claim adjourned from Chambers against the estate of *Thomas Houghton Burrell*, which was being administered by the Court.

By an indenture of lease, dated the 24th of March, 1860, the *Commercial Hotel*, in *Dale Street, Liverpool*, was demised for a term of twenty-one years from the 3rd of April, 1860, to *Edward Deakin*, his executors, administrators, and assigns, at the yearly rent of £360, subject to ordinary lessee's covenants.

By an indenture of assignment, dated the 17th of July, 1862, to which the lessors were not parties, the same hotel and premises were assigned for the whole residue of the term of twenty-one years by *Deakin* to the testator, *Burrell*, his executors, administrators, and assigns, subject to the covenants.

By an indenture of mortgage, dated the same 17th of July, 1862, the same premises were re-assigned for the whole residue of the term of twenty-one years by *Burrell* to *Deakin*, subject to a proviso for redemption and re-assignment on payment by *Burrell* to *Deakin* of the sum of £3000 and interest.

By an indenture of sub-mortgage, dated the 14th of April, 1863, the mortgage debt of £3000 and interest, and also the hotel and premises, were assigned for the residue of the term of twenty-one years, less three days, by *Deakin* to the present claimant, *Peter Ellis Eyton*, subject to a proviso of redemption and re-assignment, on payment by *Deakin* to *Eyton* of the sum of £1200 and interest. The deed contained a power of attorney to *Eyton* to sue for the debt of £3000 in the name of *Deakin*, and a power of sale.

On the 1st of August, 1863, *Burrell* died, having, by will, appointed *Henry Smith* and *Louisa Burrell* his executor and executrix.

On the 8th of December, 1863, the present suit of *Burrell* v. *Smith* was instituted by administration summons by one *George Burrell* against the executors, *Smith* and *Louisa Burrell;* and on the 21st of December following an order was made directing the usual accounts and inquiries. In January, 1864, advertisements were issued, whereupon a claim was entered in the names of *Deakin* and *Eyton* for £3000 and interest. On the 22nd of February, 1864, *Eyton* filed an affidavit in support of the claim.

According to the Plaintiff's statement, various appointments had been from time to time had before the Chief Clerk, but the claim had not been finally disposed of. According to the claimant *Eyton's* statement, the claim was allowed by the Chief Clerk.

On the 3rd of August, 1864, the Defendants *Smith* and *Louisa Burrell*, as executor and executrix of the testator, entered into a conditional contract with *Deakin*, whereby, after reciting shortly the lease and the mortgage of the 17th of July, 1862, and that there was due to *Deakin* a considerable sum for arrears of interest on the £3000, in consideration of the debt and interest then due, and also in consideration of *Deakin* releasing the executors and the testator's estate, "or procuring them to be well and effectually released from all liability in respect thereof," the Defendants agreed to sell to *Deakin* (subject to the approbation of the Judge), and *Deakin* agreed to purchase, the hotel and premises for the residue of the term, subject to the lessee's covenants; and that they, the Defendants, would, on or before the 25th of November then next, on receiving £900 and interest, assign the premises to *Deakin* free from incumbrance, except the mortgage debt of £3000, and interest; and *Deakin* agreed to covenant thenceforth to pay the rent, and perform the covenants in the lease, and to indemnify the Defendants and the testator's estate therefrom, and also effectually to discharge them from all liability in respect of the mortgage debt of £3000; and the Defendants thereby further agreed to sell to *Deakin* (subject to the same approbation), for the sum of £900, the household furniture and effects in and about the hotel, possession whereof was to be given on such contract being approved by the Court. It was stated that this agreement was never executed by *Deakin.*

On the 8th of August, 1864, the contract was ordered to be carried into effect, and on the 15th of the same month possession of the premises was delivered by the Defendants to *Deakin.*

By an indenture of further sub-mortgage, dated the 5th of December, 1864, the £3000 debt and premises were assigned by *Deakin* to the *Liverpool Loan Company, Limited,* to secure the repayment of the sum of £1000 and interest. This indenture also contained a power of sale.

On the 19th of January, 1865, *Deakin* paid into Court to the credit of the matter and cause the sum of £900, and in the year 1866, but not till then, an assignment of the premises was prepared, and a deed, whereby the premises comprised in the lease were purported to be assigned by the Defendants to *Deakin,* was executed by the Defendants, but was not dated, and was never executed by *Deakin.*

On the 31st of July, 1866, *Deakin* executed a deed of assignment of all his estate and effects to *Thomas Rigby* and *Samuel Millington,* as trustees for the benefit of his creditors. This deed was duly registered under the *Bankruptcy Act,* 1861.

In May, 1867, the hotel and premises were put up for sale by public auction, according to the Plaintiff's statement by *Eyton,* but according to *Eyton's* statement by the loan company. There was no bidding, and no sale was effected.

On the 6th of June, 1867, *Eyton* filed a bill in the *Liverpool* District of the Chancery of the County Palatine, against *Rigby* and *Millington,* and the *Liverpool Loan Company.* The bill stated

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the indentures of the 24th of March, 1860, the 17th of July, 1862, the 17th of July, 1862, and the 14th of April, 1863, and that *Deakin* had further charged the debt and premises to the *Liverpool Loan Company*, and then stated as follows:—

7. "The said *T. H. Burrell* died some time since in insolvent circumstances, and his estate is now being administered by the High Court of Chancery.

8. "In the course of such administration the executors of the said *T. H. Burrell* sold the equity of redemption in the said hotel and premises, subject to the aforesaid mortgage debt of £3000, to the said *E. Deakin* for the sum of £800, or thereabouts, and the said *E. Deakin* paid the money into the said High Court of Chancery to the credit of the cause in which the said estate was being administered, and a conveyance of the said equity of redemption to himself was duly prepared and executed. The executors and parties interested in the estate of the said *T. H. Burrell* admit that they have no interest in the property comprised in the Plaintiff's (*Eyton's*) mortgage, and the Defendants (the trustees and the loan society) admit that they (the executors and parties interested under the testator's will) are not necessary parties to this suit."

The bill further stated the execution by *Deakin* of the trust deed; that *Rigby* and *Millington*, as such trustees, had for some time carried on the business of the hotel, and paid to *Eyton* the interest on £1200; but that they had since closed the hotel, and declined to pay any further interest on the debt of £1200; and that the principal sum of £1200, with an arrear of interest, was then due to *Eyton*.

The bill prayed for an account of what was due to the Plaintiff (*Eyton*) for principal and interest on the mortgage of the 14th of April, 1863; that the Defendants, or some or one of them, might pay to the Plaintiff what should be so found due, with costs; or, in default, that the Defendants and all persons claiming under them, or any of them, might be foreclosed.

By their answer, filed the 28th of June, 1867, *Rigby* and *Millington* disclaimed all interest in the hotel and premises, and asked that the suit might be dismissed against them without costs.

By a decree made in the suit of *Eyton* v. *Rigby*, on the 12th of August, 1867, it was ordered that the Plaintiffs' bill be dismissed without costs as against *Rigby* and *Millington*; that an account be taken of what was due to the Plaintiff for principal and interest on the security of the deed of the 14th of April, 1863, and for costs; and that upon the loan company paying the amount within six months after the registrar's report, the Plaintiff should transfer the mortgage debt, interest, and securities, to the Defendants, and, in default, that the loan company should be foreclosed of all equity of redemption of the said debt and premises.

By his report, dated the 26th of November, 1867, the registrar found that there was due to the Plaintiff the sum of £1539 12*s.*, for principal and interest, and £55 19*s.* 2*d.* for costs, making together £1595 11*s.* 2*d.*

On the 11th of June, 1868, a decree of foreclosure absolute, in *Eyton* v. *Rigby*, was made against the *Liverpool Loan Company*.

Since May, 1867, the hotel had been closed, and in the latter part of 1868, as it was unoccupied and in a bad state of repair, the original lessors entered. For about two years previously the ground-rent had been paid by *Eyton*.

According to *Eyton's* statement, the joint claim, preferred by him alone, had been allowed by the then Chief Clerk; but when the Plaintiff discovered that *Eyton* had obtained a foreclosure decree, he contended that *Eyton* had waived his right to prove against the estate, and the present Chief Clerk recommended the adjournment of the claim into Court.

There were no other unallowed claims outstanding against the estate. The state of the debts and assets was such, that even if this claim were disallowed the estate would be able to pay only about 2*s.* in the pound. It thus became important to the claimant to establish his claim to the whole of the £3000.

With regard to the "admission," referred to in paragraph eight of the bill in *Eyton* v. *Rigby*, it appeared that in a letter addressed by Mr. *J. B. Wilson*, the solicitor of *Eyton*, to Mr. *E. Turner Payne*, the solicitor for the executors, dated the 23rd of May, 1867, the writer said: "Mr. *Eyton*, as mortgagee of the *Commercial Hotel*, has directed me to serve notices of his intention to sell. Messrs. *Harvey & Co.* tell me you are acting for Mr. *Burrell's*

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executors, but, at the same time, that they have parted with all their interest to Mr. *Deakin*. However, as Mr. *Eyton* has directed the notice to your clients, may I ask if you will accept service of the inclosed notice on their behalf?" To this Mr. *Payne* replied, on the 24th of May, 1867: "My clients, the executors of the late *Thomas H. Burrell*, some time since parted with all their interest in this property, by assigning the same to Mr. *Deakin*, their testator's mortgagor, with the sanction of the Court of Chancery, in which the assets of the deceased are being administered. I have no objection to accept service on behalf of my clients, though I conceive it is, as respects them, an absolute nullity."

Mr. *Druce*, Q.C., and Mr. *F. H. Colt*, for *Eyton*:—

As to the proof: we submit that, as it was founded on the affidavit of *Eyton* alone, as it was allowed to be good on behalf of *Deakin* and *Eyton* in 1864, and as *Deakin's* trustees have disclaimed, it is now vested in *Eyton* alone.

Proof allowed is equivalent to a judgment against *Burrell's* estate; and no subsequent transaction between *Burrell's* executors and *Deakin*, in *Eyton's* absence, can affect *Eyton's* rights.

As to the mortgage debt of £3000, we claim to be absolute owners of it, and entitled to sue in respect of it on the covenants n *Deakin's* name.

As to the equity of redemption, the Plaintiff may say that we cannot, after having foreclosed *Burrell's* executors, proceed against the estate. Our answer is, that we have not foreclosed the executors. We avoided making them parties to the suit of *Eyton* v. *Rigby*, we did not and do not lay claim to the three days' reversion, and we say the reversion is not in us. The suit was framed in respect of the sub-mortgage only, consistently with the practice: *Seton* on Decrees (1); and the decree was confined to an account of the £1200 debt and interest only. As to the forfeiture, we were never liable to pay the rent or observe the covenants.

Nothing has ever been done to exonerate *Burrell's* estate.

No doubt the authorities, from *Tooke* v. *Hartley* (2) downwards, shew that a mortgagee cannot, after foreclosure, sue on the covenant for the deficiency without re-opening the foreclosure, and as he can-

(1) Page 395.
(2) 2 Bro. C. C. 125.

not re-open the foreclosure without restoring the estate, *Lockhart* v. *Hardy* (1), if he have sold the estate his right of action is gone. But we submit that the doctrine applies only where the inability to restore the estate arises from the fault of the mortgagee. The doctrine does not apply where the estate has been lost from non-observance of covenants which the mortgagee was not bound to observe. That is this case; the difficulty here has arisen from the executors not having paid the rent; and from their complicated arrangements with *Deakin*.

If the executors can shew that they are entitled to redeem us, and the lessors should be willing to waive the forfeiture, we are ready and willing to be redeemed; but if not, the executors must pay us.

Mr. *Kay*, Q.C., and Mr. *Cozens-Hardy*, for the Plaintiff:—

The claimant, by his own act, has put it out of his power to restore the estate.

He has shifted his ground. In the foreclosure bill he alleged that the executors admitted they had no interest in the subject matter, and that the Defendants in that suit, *Deakin's* trustees and others, admitted the executors were not necessary parties. Now he says that he studiously avoided making us parties; and that we have an interest which he did not seek to foreclose.

As to the proof, *Eyton* can claim only through *Deakin* as his mortgagee. If *Deakin's* right to prove be gone, *Eyton's* must fall with it.

The disclaimer, by answer, by *Deakin's* trustees extended to the whole estate of which *Deakin* was mortgagee. It operated like a reconveyance in equity of that estate by *Deakin's* trustees to the Plaintiff *Eyton*.

From the frame of the suit in *Eyton* v. *Rigby*, it is plain that *Eyton's* object was to take, and we submit he did take, all the interest of *Burrell's* executors, and was let into possession on that footing.

The effect of disclaimer by answer is not limited by the statements, whether correct or incorrect, which may happen to be made in the bill. It operates like a fine, which was an action brought upon a covenant, which, though fictitious, was admitted for the pur-

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(1) 9 Beav. 349.

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poses of the proceeding to be true. Thereupon, judgment was taken in the action, which became as effective a conveyance as a feoffment with livery of seisin.

[The VICE-CHANCELLOR gave it as his opinion that the effect of the disclaimer was not to enlarge the Plaintiff's estate, but that it merely extended to the matters which were at issue in the suit.]

Eyton took possession; at any rate he paid the ground-rent. Having done so, it was his wrong to suffer the forfeiture by discontinuing to pay the rent. Now, if *Eyton* relies on his legal right of action, he must abandon his foreclosure. So long as the foreclosure is treated by him as absolute, his right of action is gone. He will be restrained: *Palmer* v. *Hendrie* (1); *Perry* v. *Barker* (2); *Schoole* v. *Sall* (3).

Apart from the question of disclaimer, when the foreclosure decree was made: *Eyton* got the whole of the £3000, and the whole lease, less three days. He knew the position of *Burrell* to *Deakin*. Being in possession, he omitted giving notice to *Burrell's* executors of the breach of covenant, and allowed *Deakin's* intermediate estate to be destroyed. How can he, after that, have the right of suing *Burrell's* estate in *Deakin's* name?

Eyton must be held to have elected to take the property in extinction of his claim.

A mortgagee, after he has transferred the mortgage, cannot sue upon collateral securities which he did not part with when he transferred the mortgage debt: *Walker* v. *Jones* (4).

Mr. *Boyle*, for the Defendants.

Mr. *Druce* objected to his being heard.

The VICE-CHANCELLOR said that he could not hear a second argument from counsel for the Defendants who were in the same interest as the Plaintiff.

SIR W. M. JAMES, V.C.:—

In this case *Thomas Houghton Burrell* was a debtor in respect of a sum of £3000 advanced to him on mortgage. That debt was due to *Edward Deakin*, and *Deakin*, by an indenture of the 14th day of April, 1863, assigned the mortgage debt, by way of sub-mortgage, to *Peter Ellis Eyton*. *Deakin* also made a sub-lease to the same *Eyton* for the residue of the original term, less three days. A suit was instituted in this Court for the administration of *Burrell's* estate. In that suit *Eyton*, being entitled in equity to receive the £3000, took in a claim to that amount against *Burrell's* estate. In equity *Eyton* alone was the person entitled to sue upon or to release that debt, subject, of course, to the power of *Burrell* to redeem the estate by paying the debt due to *Deakin* and *Eyton*. Without any concurrence on the part of *Eyton*, the equitable owner of the debt, some arrangement was made by which, as between *Burrell's* executors and *Deakin*, the property was conveyed to *Deakin*, and *Deakin* undertook to release them from all liability in respect of the debt.

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(1) 27 Beav. 349.
(2) 8 Ves. 527.
(3) 1 Sch. & Lef. 176.
(4) Law Rep. 1 P. C. 50. 12 Jur NS 38

Eyton, of course, cannot be bound by any transaction of that kind. It is quite clear that after assignment of a debt, and notice given to the debtor, the debtor cannot discharge himself without making payment to the equitable owner of the debt. *Eyton's* right, therefore, was not affected by that transaction. He was entitled to have the £3000 paid to him; of that sum he has never received a farthing; he has never been satisfied; and the question now is, whether, by what he did in the Palatine Court, or since, he has forfeited his right to obtain that which was his due.

The effect of the proceedings in the Palatine Court was simply to deprive *Deakin* of his right to institute a suit for the purpose of redeeming the property. In equity that right was foreclosed; that was all; and the foreclosure of *Deakin* did not in any way defeat the right of *Eyton* to be paid out of *Burrell's* estate.

It is now said that *Eyton* took possession, and paid rent, under his mortgage deed and his foreclosure, or one of them. But that did not determine his right to have payment of the debt due to him.

Then it is said he is not in a position to restore the estate if the mortgage claim be satisfied; and that, consequently, he has lost his right to enforce payment of the debt. He is not in a position to restore the estate, simply because the freeholder, by title paramount, has evicted him and everybody else.

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But was *Eyton* in default in permitting the eviction? I am of opinion he was not. It never was his duty to pay the rent, and observe the covenants. *Burrell's* executors were bound to pay the rent; *Deakin* was bound to pay it; but *Eyton* never undertook either at Law or in Equity, to pay the rent, or observe the covenants. The entry of the superior landlord was the same in effect as if a fire or a flood had come and swept away the property.

Nothing has been done to render *Eyton* liable. He has simply by *vis major*, or rather, by the default of his mortgagor been deprived of the thing which he held as a security for his debt, and which, if *Burrell's* executors had paid the debt, they might have recovered.

There has been no default on his part; he has not received payment; he has not released the debt; and I think he is entitled to prove for the whole, and receive in respect of it as much as the estate can pay.

The order will be, that he is not to receive more than the amount which is due to him for principal, interest, and costs on his submortgage. He will add his costs of the adjournment to the debt; and I can only allow one set of costs. I allow no costs to the Defendants; they need not have appeared by counsel on this occasion.

Solicitor for the Claimant: Mr. *Thomas Henry Williams.*
Solicitors for the Plaintiff: Messrs. *Sharpe, Parkers, & Pritchard.*
Solicitor for the Defendants: Mr. *G. F. Cooke.*

EARL OF JERSEY *v.* BRITON FERRY FLOATING DOCK COMPANY.

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1869
March 1.

Vendor and Purchaser—Company—Lands Clauses Act—Sale in Consideration of Rent-charge—Arrears of Rent-charge—No Vendor's Lien.

8 Eq 655
5 Ch 416
11 Eq 172
4 Ch D 565

By an agreement dated in 1851, a company, under powers conferred by the *Lands Clauses Act*, contracted, in consideration of the payment of a yearly rent-charge, to purchase land for the construction of docks. The company had entered, and completed the construction of the docks, but had not made any payment in respect of the rent-charge:—

Held, that the vendors were not entitled to a lien for the unpaid arrears of the rent-charge.

THIS was a bill by the legal personal representatives of the Right Hon. *George* fifth Earl of *Jersey*, against the *Briton Ferry Floating Dock Company*, and the *Great Western Railway Company*, for specific performance of a contract, and other relief.

The first Defendants were a company incorporated by the *Briton Ferry Dock and Railway Act*, 1851, for the purpose of making and maintaining docks at *Baglan Bay, Glamorganshire,* with a branch line of railway to the *South Wales Railway.*

The agreement, which was dated the 5th of April, 1851, and signed by Lord *Jersey*, and by *John Rowland* and *Henry Hussey Vivian* as agents of the first Defendants, was expressed to be made between the Earl of the one part, and the dock company of the other part, and contained, amongst others, the following clauses:—

1. Thereby, for the considerations thereinafter mentioned, the Earl agreed to sell and grant and assure unto the company, and the company agreed to purchase and take, for the purpose of making docks, with a branch line of railway to the *South Wales Railway,* the fee simple and inheritance, free from incumbrances, of and in all that piece of mudland situate at or near *Baglan Bay,* in the county of *Glamorgan,* in the plan thereto annexed delineated, and therein coloured red, at and subject to the therein mentioned annual rent-charge and royalties, to be reserved and payable half-yearly at Midsummer and Christmas, the rent and royalties to be as follows, viz.:—

2. The annual rent of £250 for the year ending Midsummer, 1853.

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3. The annual rent of £300 for the year ending Midsummer, 1854, and the rent of £400 for ever thereafter.

4. In addition to the above, a royalty be paid of one farthing for every ton up to £300,000, and one halfpenny for every ton beyond £300,000, of all goods shipped or unshipped, received or delivered within the limits of the docks and works on which rates or tolls shall be payable to the dock company.

5. Should the dock company's net revenue exceed £5000 per annum, then the fixed rent payable to the said Earl to be increased at the rate of 10 per cent. on such excess.

14. That the above-mentioned rents and royalties should be charged and secured by the conveyance, according to the provisions of the 11th section of the *Lands Clauses Consolidation Act*, 1845 (1).

On the 3rd of July, 1851, the *Briton Ferry Dock and Railway Act*, 1851, received the royal assent, embodying, amongst others, the *Lands Clauses Act;* and in it the above agreement is referred to and recognised as binding on the company.

The dock company entered into possession of the land, and constructed docks and sidings communicating both with the *Great Western* system and with the *South Wales Mineral Railway.*

In 1857 and 1859 the dock company obtained Parliamentary powers enabling them to raise further money for their works, and authorizing various arrangements between themselves and the *Vale of Neath* and other railway companies.

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(1) The 10th and 11th sections of the *Lands Clauses Act*, 1845, provide as follows:—

Sect. 10. "It shall be lawful for any person seised of, or entitled to dispose of absolutely for his own benefit, any lands authorized to be purchased for the purposes of the special Act, to sell and convey such lands, or any part thereof, unto the promoters of the undertaking in consideration of an annual rent-charge payable by the promoters of the undertaking. . . ."

Sect. 11. "The yearly rents reserved by any such conveyance shall be charged on the tolls or rates, if any, payable under the special Act, and shall be otherwise secured in such manner as shall be agreed between the parties, and shall be paid by the promoters of the undertaking as such rents become payable; and if at any time any such rents be not paid within thirty days after they so become payable, and after demand thereof in writing, the person to whom any such rent shall be payable may either recover the same from the promoters of the undertaking, with costs of suit, by action of debt in any of the superior Courts, or it shall be lawful for him to levy the same by distress of the goods and chattels of the promoters of the undertaking."

On the 21st of September, 1860, an agreement was entered into between the dock company and the *Vale of Neath Company*, under which the *Vale of Neath Company* guaranteed the payment of the dividend on the dock company's preference share capital to an amount not exceeding £40,000, and had certain powers of receiving the rates leviable by the dock company in the event (which had, in effect, happened) of their making any payment on account of the dividends.

Under another arrangement the dock company's business for some years prior and up to 1866 was conducted and managed by the *Vale of Neath Company*.

In 1866 the *Vale of Neath Company* was amalgamated with the *Great Western Railway Company*, and since then the latter company had conducted and managed, and had received the rates and tolls payable to, the dock company.

The bill stated the above facts; and alleged that the Defendants, the dock company, had accepted the title; that the Plaintiffs were able and willing to convey; that no rent or royalties had ever been paid under the agreement of the 5th of April, 1851, and that a large sum was due to the Plaintiffs on account thereof; that there had been no waiver; that payment had not hitherto been insisted on, because the expenses of the undertaking had been very large as compared with the income; and that now the annual income exceeded the outgoings; and the Plaintiffs insisted that the surplus ought to be applied in or towards payment and satisfaction of the rent and royalties reserved by the agreement of the 5th of April, 1851, and the arrears thereof.

The bill prayed for a declaration that the agreement ought to be specifically performed, the Plaintiffs offering to convey; for a declaration that the Plaintiffs were entitled to a lien on the lands and hereditaments comprised in the agreement for all sums due and coming due to them thereunder, and that such lien might be enforced by a sale of the hereditaments, or a competent part thereof; for a receiver, accounts, and inquiries, and costs against the dock company.

The dock company, by their answer, stated that the title had not yet been accepted by them; admitted that no rent or royalties had been paid by them under the agreement; but insisted that the Plaintiffs were not entitled to any lien on the hereditaments.

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Mr. *Druce*, Q.C., and Mr. *Kekewich*, for the Plaintiffs:—

The only important questions are those of lien and of the receiver.

As to lien: that an unpaid ordinary vendor is entitled to a lien against both of two railway companies, one of which is under agreement to work the line of the other, appears from *Bishop of Winchester* v. *Mid-Hants Railway Company* (1).

In this case the sale to the company was for a rent-charge in conformity with sect. 10 of the *Lands Clauses Act*, 1845. In *Eyton* v. *Denbigh Railway Company* (2) a receiver had been appointed, and the Court gave the person entitled to the rent-charge a power of distress besides.

It is no answer to the prayer for a declaration of lien to say that a right to have a lien declared is not mentioned in the statute.

Independently of the statute, what would be the position of an unpaid vendor? The decision of Sir *John Leach* in *Winter* v. *Lord Anson* (3), which was against the lien in that case, was reversed, on appeal, by Lord Chancellor *Lyndhurst* (4).

Every single payment must be held to be a part payment of the whole purchase-money. Hence we are as much entitled to a lien for each instalment as for a gross sum.

[The arguments as to the receiver became, in the result, immaterial].

Mr. *Wickens*, for the Defendants, the dock company.

Mr. *Speed*, for the Defendants, the *Great Western Railway Company*.

SIR W. M. JAMES, V.C.:—

With regard to the lien, the case appears to me to be entirely governed by the case of *Winter* v. *Lord Anson* (5).

The view of Vice-Chancellor Sir *John Leach*, which, I think, is not affected by the decision of Lord Chancellor *Lyndhurst* on the appeal, though he came to a different conclusion on the facts, is thus expressed (1):—"In ordinary cases, where the conveyance expresses, contrary to the fact, that the purchase-money is paid, there, though the estate passes at law by the conveyance, it does not pass in equity until the actual payment of the price—until the vendor has received that consideration for which it appears by the deed he contracted to part with his estate. Suppose it had been expressed in this conveyance that the price was not to be paid till the death of the vendor, and there had been a covenant on the part of the purchaser then to pay the amount, and to pay the interest in the meantime; could it then have been said that it appeared by this deed that the vendor had contracted not to part with his estate until the actual payment of the price? Would it not rather have been the true effect of the language of the conveyance in such case that the vendor had contracted to part with his estate presently, not in consideration of the actual immediate payment of the price, but in consideration of the covenant for the future payment of that sum, with interim interest; and that having, therefore, the covenant, which was the consideration bargained for, the estate must pass by the conveyance in equity as well as at law."

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(1) Law Rep. 5 Eq. 17.
(2) Ibid. 6 Eq. 14.
(3) 1 S. & S. 434.
(4) 3 Russ. 488.
(5) 1 S. & S. 434; 3 Russ. 488.

Now let us consider what the effect of these doctrines is, as applied to this case. A man conveys a piece of land for the construction of a public work, in consideration of an annual payment. It appears to me it would be quite contrary to the intention of the parties to suppose the vendor was reserving to himself a right at some future time to enter and destroy the public work if the annual rent should fall into arrear. Hence, in my opinion, there is no lien in such a case for unpaid purchase-money.

The question of a receiver stands on a very different footing, but that question does not arise till the conveyance is settled.

At present all that can be done is to declare the Plaintiffs entitled to a decree for specific performance; to direct an inquiry as to title, with an execution of the conveyance, to be settled in Chambers if the parties differ; reserving further consideration and costs, without prejudice to any question as to a receiver.

Solicitors for the Plaintiffs: Messrs. *Freshfields.*

Solicitors for the Defendants: Messrs. *Young, Maples, & Co.*

(1) 1 S. & S. 444.

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Feb. 27.

15 Eq. 177.

8 Ch. 344-5

18 Eq. 579, 580

585

19 Eq. 97

3 Ch. D. 220

ROW *v.* ROW.

Will—Administration of Assets—Costs of Administration Suit—Personal Estate insufficient—Real Estate specifically devised—Real Estate descended.

A testator devised the whole of his real estate specifically to trustees upon certain trusts, the will containing no residuary devise. Some of the gifts of the realty were held void for uncertainty, and lapsed to the heir-at-law. The personal estate was insufficient to pay the debts:—

Held, that the costs of administering the estate must, as between the heir-at-law and the specific devisees, be borne primarily by the real estate descended.

THOMAS BENISON ROW, who died on the 23rd of November, 1858, by his will, dated the 28th of October, 1858, gave and bequeathed unto his executors thereinafter named all his estate, called *Know House, Ellel, Lancashire,* and three cottages and gardens, and all the money in *Lancaster Bank* at his death, "upon trust as follows." He then gave his wife, *Dorothy Row*, £35 per annum during her lifetime, provided she remained his widow; and it was his wish that she should occupy the house rent free which he then occupied, together with the use of the household goods and furniture therein, provided she remained his widow; and after her death, he directed his executors to sell and dispose of the household goods and furniture, and deposit the proceeds thereof in the *Lancaster Bank*. He further directed his executors to collect the rents of his said estate and cottages and gardens, and place the balance thereof, after paying all reasonable expenses for repairs, into the *Lancaster Bank*, there to remain for seven years from the decease of his said wife; and at the expiration of seven years, he directed his executors to divide the money "in the manner following." He then gave a number of small legacies, amongst others one of £100, to be divided equally amongst the nephews and nieces of his wife *Dorothy Row*. He then directed his executors to divide the remainder equally amongst certain classes of persons. He then directed his executors, after the expiration of the term of seven years, to collect, every six months, the rents of his estate called *Know House*, and divide the same into three equal parts, to be paid to the persons whom he named. He also disposed of the rents of his three cottages, and appointed three executors.

The will contained no disposition of the residue of the estate, real or personal.

The widow, *Dorothy Row*, died on the 6th of December, 1858.

Several questions of construction arose upon the will, and on the 16th of July, 1854, the present suit was instituted by a devisee entitled in remainder to a share of the rents of *Know House*, against the executors and others for performance and execution of the trusts of the will, and administration of the estate; and an administration decree was made on the 11th of March, 1865.

The Chief Clerk's certificate, dated the 12th of February, 1866, found that *Know House* and the cottages described in the will were the whole of the testator's real estate; that the personal estate was to a small extent insufficient to pay the debts; and that, as the widow *Dorothy* had no nephews or nieces, the legacy of £100 had failed.

As to one-sixth of the disposition of the rents of *Know House*, the devise was (in the view of the Court) void for uncertainty.

By an order on further consideration, dated the 27th of June, 1866, the costs of the Plaintiff and Defendants in the suit were ordered to be taxed, those of the executors as between solicitor and client, including charges and expenses properly incurred; the executors were ordered to pay into Court to the credit of "The Seven Years' Rent Account" the residue of what was certified to be due from them, being rents and profits of the real estate accrued during the seven years, after deducting the small sum due to them in respect of the personal estate; with liberty to pay into Court to the credit of two accounts, to be called respectively "The Rent Account of *Know House*," and "The Rent Account of the Cottages," what should appear by affidavit to have been received by them in respect of the *Know House* estate, and in respect of the cottages, subsequent to the last account; and the real estate was ordered to be sold, and the proceeds to be paid into Court.

The real estate had been sold, and there were now five funds in Court:—(1.) The Seven Years' Rent Account. (2.) The Proceeds of Sale of *Know House*. (3.) The Proceeds of Sale of the Cottages. (4.) The Rent Account of *Know House;* and (5.) the Rent Account of the Cottages.

The Plaintiff now presented a Petition in the suit, praying for payment of his share. The Petitioner submitted that all the costs of the suit ought to be borne rateably by funds (1), (2), and (3); and prayed accordingly.

The only question of general interest in the Petition was that of the costs of the suit and Petition.

Mr. *Kay*, Q.C., and Mr. *Jolliffe*, for the Petitioner.

Mr. *W. Pearson*, for a Respondent in the same interest.

Mr. *Schomberg*, Q.C., and Mr. *A. E. Miller*, for other Respondents:—

Whatever falls to the heir-at-law is first liable to pay the costs of the suit: *Morley* v. *Tunstall* (before the Master of the Rolls, 19 April, 1859, unreported) (1).

Mr. *Rowcliffe*, for the heir-at-law:—

The costs are payable out of the seven years' rent account and the two sale accounts rateably. There is no reason why the heir should suffer more than a specific devisee.

Mr. *Bird*, for an infant legatee.

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(1) The following is an abbreviated extract from the decree in *Morley* v. *Tunstall*:—

"Declare that nine eighty-sixth parts of the proceeds of the testator's leasehold estate bequeathed to the Plaintiffs in trust for sale lapsed, and fell into his general personal estate not specifically bequeathed; and that nine eighty-sixth parts of the proceeds of his real estate, devised to the Plaintiffs in trust for sale, likewise lapsed, or descended to his heir-at-law.

"Declare that the testator's debts, funeral and testamentary expenses, and the pecuniary legacies given by his will, and not thereby made payable out of any particular estate or fund, and also the costs of this suit, and the charges and expenses properly incurred by the Plaintiffs as executors or trustees of the testator's will, ought to be paid and considered as paid, in the first place, out of his personal estate not specifically bequeathed, including such shares of the proceeds of the sale of the leaseholds specifically bequeathed as lapsed; and in the event of the same being deficient, then that, as between the pecuniary legatees and the testator's heir-at-law, the amount of the deficiency of such general personal estate to answer the testator's debts, and the costs of this suit, and the charges and expenses of the trustees hereinbefore provided for, ought to be borne and made good by the proceeds of the descended shares of the real estate devised to the Plaintiffs in trust for sale, so far as the same may be sufficient for that purpose. . . ."

Mr. *Kay*, in reply :—

The costs of an administration suit are a debt of the testator, he having by his will created the difficulty. Being a debt, they are payable out of descended real estate before real estate devised.

The costs of administering the estate are not testamentary expenses : *Browne* v. *Groombridge* (1).

Real estate devised charged with payment of debts is liable for costs before real estate devised not so charged : *Wilson* v. *Heaton* (2).

The rule is, that all the costs of administration must be apportioned rateably between the realty and personalty ; and then, that the costs of administering the real estate must be paid first out of the real estate not specifically devised : *Sanders* v. *Miller* (3).

Sir W. M. James, V.C. :—

18 Eq 585.

Here the whole estate is vested in the trustees, and the costs of suit are costs incurred in the execution of the trusts. It is, therefore, in the power of the Court to make an order throwing the costs on the undisposed of part of the trust estate, which it might not feel itself at liberty to make if the heir-at-law were here with a clear legal estate in property descended to him.

His Honour then held that the gifts of rents were gifts in fee simple ; that the gift of one-sixth share of *Know House* was void for uncertainty ; and that as to this sixth there was an intestacy, and the same descended to the heir-at-law. He also held that the £100 legacy lapsed and fell to the heir.

His Honour then directed that the £100 and the descended sixth of *Know House* should go first in payment of the costs ; and that the remaining costs should be borne rateably by the seven years' rent account and the two sale accounts, as prayed by the Petition.

Solicitors for the Petitioner and some Respondents : Messrs. *Bower & Cotton*, agents for Messrs. *Sharp & Son, Lancaster*.

Solicitors for other Respondents : Messrs. *Skilbeck & Griffith ;* Messrs. *Gregory, Rowcliffes, & Rawle ;* Messrs. *Clarke, Woodcock, & Ryland.*

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(1) 4 Madd. 495.
(2) 11 Beav. 492.
(3) 25 Beav. 154, 158.

V.-C. J.
1869
Feb. 25.

TAYLOR *v.* PILLOW.

Copyright—Assignment—Surplus Stock.

In the absence of special contract to the contrary, the assignor of a copyright is entitled, after the assignment, to continue selling copies of the work printed by him before the assignment and remaining in his possession.

MOTION for an injunction to restrain the Defendant from printing, or selling, or offering for sale, any copies of a song called "*I heard a Spirit sing.*"

The song was composed by the Plaintiff *Taylor*, and in July, 1866, he entered into an agreement with the Defendant *Pillow*, by which he agreed to assign to *Pillow* the sole copyright of the words and music of the song, in consideration of which *Pillow* agreed to pay *Taylor* the sum of 14*s.* for every 100 copies sold of the song, until 3000 should have been sold, after which the royalty payable was to be 21*s.* for every 100 copies sold.

The Defendant entered into partnership about the date of this agreement with one *Bath*, under the firm of *Sinclair & Co.*, music publishers. In November, 1868, the musical copyrights and other stock-in-trade of *Sinclair & Co.* were sold by auction, and the Plaintiff *Williams* purchased the copyright of "*I heard a Spirit sing*" for £241 10*s.*

The catalogue included 200 copies of the song, which were also taken by the Plaintiff *Williams*, who alleged his belief, from what was said by the auctioneer at the time of the sale, that these 200 were all the copies of the song that were then printed by the Defendant and not sold by him.

[The evidence on this point was conflicting, it being asserted on behalf of the Plaintiffs, that the auctioneer, in answer to questions put to him, stated expressly that purchasers of copyrights would be entitled to the refusal of all the stock at a price to be named. This was denied by the auctioneer, who stated that all that he had said was, that purchasers would be entitled to the refusal of all the copies of such copyrights in the catalogue, and that he had said nothing about all the stock; while the Defendant asserted that he had never intended to part with all the printed stock of the song, but that it should remain part of the general partnership stock for ultimate division. The custom of trade alleged on behalf of the Plaintiffs, that the purchaser of a copyright had the refusal of the whole of the stock, and that, in the absence of express contract, any person bidding for a copyright would do it on that footing, was also denied by the Defendant and his witnesses.]

Since the sale by auction, the Defendant had sold copies of the song at a price much below the published price, and without paying to *Taylor* the stipulated royalties. The bill charged that these copies were printed by the Defendant since the auction, but there was no evidence of this; and that even if they were (as the Defendant insisted) printed previously to the sale, the Plaintiff *Williams* had acquired a right of pre-emption at the price named at the auction, and that all such copies must have been and were improperly kept back from him on that occasion. Under these circumstances the bill was filed by *Taylor* and *Williams*, praying an account of all copies sold by the Defendant since the 16th of November, 1868; payment to *Taylor* of his royalty of 21*s.* for every 100 copies so sold; and that Defendant might be decreed to pay to Plaintiff *Williams* the residue of the profits made by him on such sales (after payment of such royalty), less (as to copies printed before the sale) the sum which *Williams* would have been required to pay for the copies had the same been duly produced to, and purchased by him at the auction. An injunction was also prayed against printing, or selling, or offering for sale, any copies of the song.

The catalogue of the sale by auction included upwards of 50,000 copies of songs, of which the copyrights and plates were for sale, and contained the following statement:—

"Purchasers of copyrights at this sale will please understand, that where the same have been used in tune books, instruction books, &c., they will have no power to stop any such quotations as now exist in works to be sold at this sale;"—but was silent as to stock remaining in the vendors' possesssion.

Mr. *A. E. Miller*, for the Plaintiffs, in support of the motion

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contended, first, that any sale by the Defendant of copies of the song, whenever printed, after parting with the copyright, was an infringement of the copyright assigned to *Williams*; and, secondly, was a breach of contract, inasmuch as *Williams*, relying on the custom of the trade and what passed in the auction room, purchased the copyright and the 200 copies, specially included in the catalogue as something apart from the copyright, on the faith that he was getting all the printed copies in the possession of the Defendant.

Mr. *Eddis*, for the Defendant, opposed the motion:—

The Defendant is entitled, at any time after parting with his interest in the copyright, to continue selling the remaining stock printed by him while he was in possession of it as equitable owner: *Howitt* v. *Hall* (1). There has been no *mala fides* on his part, or attempt to mislead purchasers; the conditions of sale saying nothing whatever as to all copies of the song in the vendor's possession passing with the copyright, while the auctioneer denies having made the statement attributed to him in the Plaintiffs' evidence, and the alleged custom of trade relied on by the Plaintiffs is negatived by Defendant's witnesses.

Mr. *A. E. Miller*, in reply.

SIR W. M. JAMES, V.C.:—

The Plaintiff rests his case in support of the motion upon two grounds: first, that he is entitled to restrain the sale by the Defendant of any copies of the song, as being an infringement of the copyright purchased by *Williams;* and, secondly, that he is entitled to restrain such sale as being a sale of what he has already bought. On the first point, I was at first in favour of the Plaintiff's view; but on looking at the *Copyright Act* (5 & 6 Vict. c. 45), I find that the definition given of copyright is "the sole and exclusive liberty of printing or otherwise multiplying copies;" and unless there is some stipulation to the contrary in the conditions of sale, the vendor of a copyright may print any number of copies up to the time of the sale, and retain and sell such copies after disposing of

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(1) 10 W. R. 381.

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the copyright. There is no evidence that the Defendant has sold anything printed since the sale, and therefore the case of infringement of copyright fails entirely. As to the second ground, the Plaintiff says that he made a bargain for all copies that the Defendant had. But even if this were so, and I will not enter into the evidence for the purpose of deciding the question, no case arises for the interference of a Court of Equity. It is the ordinary case of a purchaser of goods complaining that the vendor has not delivered to him all that he contracted to buy. There will be no order upon the motion; and the costs will be costs in the cause.

Solicitors: Messrs. *Courtenay & Croome*; Mr. *Ditchman.*

HILL *v.* HIBBIT.

V.-C. J.
1869
Feb. 27.

Practice—Administration Suit—Second Suit by a Claimant to have Evidence taken de bene esse—Examination and Cross-examination of Witness—Application to have de bene esse Evidence read in Administration Suit refused.

Where a bill had been filed to administer the real and personal estate of an intestate, the object being to ascertain his co-heirs and next of kin, and after decree made, but before it was drawn up, a person claiming to be a co-heir and one of the next of kin, not a party to the first suit, had filed a bill against all the parties to the first suit also praying administration, with the object of having the evidence of a witness taken *de bene esse*, and the witness had been examined and cross-examined—an application that the evidence taken *de bene esse* in the second suit might be read in the first suit was refused.

THIS was a suit for the administration of the real and personal estate, and partition of the real estate, of an intestate, *John Wight Wight*, formerly *John Wight Hibbit*, who died on the 10th of May, 1867, without having been married. Administration to his estate and effects had been granted to *Mary Wight Hill*, widow, a sister, and *Arthur Hibbit*, a half-brother, of the intestate.

The bill stated that the intestate left neither father, mother, brother, nor any descendant of a brother of the whole blood surviving, but that he had had six sisters. Of these, two died unmarried in his lifetime. Of the other four, one, *Casandra Ann Hibbit*, died on the 25th of February, 1868, having, as was alleged

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by two of the Defendants, *George Lilwall* and *Mary* his wife, made in their favour a will, which was disputed, and had not been yet proved. A second, Mrs. *Hill*, was the Plaintiff. A third, Mrs. *Moore*, died in intestate's lifetime, leaving a son, the Defendant *William Hibbit Moore*. The fourth, *Harriet White Hay*, also died, married, in the intestate's lifetime; and the bill alleged: "It is not known whether the said *Harriet Wight Hay* has left any children."

The intestate also left two brothers of the half-blood, one of them the Defendant *Arthur Hibbit*, and *Ellen Woods*, widow, a sister of the half-blood.

The bill, filed on the 13th of March, 1868, prayed for administration and partition, the usual accounts and inquiries, directions for settling the question of the validity of the will, costs of such proceedings, a receiver, and, if necessary, an injunction against Mr. and Mrs. *Lilwall*.

On the 30th of July, 1868, an administration decree was made, but before the order was drawn up a bill was, on the 12th of November, 1868, filed by *Sarah Angus Hay*, spinster, claiming to be the only child of Mrs. *Hay*.

The Defendants to this suit were Mrs. *Hill*, *Arthur Hibbit*, Mr. and Mrs. *Lilwall*, *William Hibbit Moore*, *Henry Hibbit*, and *Ellen Woods*; and the bill, after stating the above facts as to the death of the intestate, and the state of the family, the filing of the bill in *Hill* v. *Hibbit*, and that a decree had been made, and had not yet been prosecuted, proceeded to allege as follows:—

"The Plaintiff is not a party thereto, nor has, as she is advised, any right to take any proceedings therein.

"In the course of the administration of the real and personal estate of the said intestate, *John Wight Wight*, it will be necessary for the Plaintiff to prove that she is the only child of the said *Harriet Wight Hay*. For this proof the evidence of the Plaintiff's father, *James Hay*, is necessary. The said *James Hay* is upwards of eighty years of age, and it is important to the Plaintiff that this evidence should be taken *de bene esse*. The Plaintiff is advised, however, that she has no right to have such evidence so taken in the said existing suit as it now stands, and she does not consider it safe to wait until the usual inquiries in the said suit as to the persons entitled to the real and personal estate of the said *John Wight Wight*, are prosecuted.

"The Plaintiff, therefore, is obliged to institute this suit."

The bill then prayed for administration and partition in terms almost identical with the prayer of *Hill* v. *Hibbit*, but it did not contain any prayer for leave to examine any witness for the purpose of perpetuating testimony.

Late in November the decree in *Hill* v. *Hibbit* was drawn up.

An order was obtained in *Hay* v. *Hill* to examine Mr. *James Hay de bene esse* on behalf of Miss *Hay*, and notices of the appointments having been served on the Defendants in *Hay* v. *Hill*, they attended, and cross-examined Mr. *Hay* on his evidence. This took place on the 28th of November, 1868, and the 16th of January, 1869, and the examination was adjourned, and a further appointment obtained for the 22nd of February.

On the 22nd of January, advertisements were issued in pursuance of the decree in *Hill* v. *Hibbit*, under which Miss *Hay* had come in as a claimant.

A summons, dated the 13th of February, was then taken out in *Hill* v. *Hibbit* on behalf of Miss *Hay*, that the further examination of Mr. *James Hay*, to be taken before the Examiner on the 22nd of February then instant, or any subsequent examination, might be taken in the suit of *Hill* v. *Hibbit;* and that the examination and cross-examination of the said witness already taken before the Examiner on the 28th of November, 1868, and the 16th of January, 1869, might be read as evidence on the part of *Sarah Angus Hay* in *Hill* v. *Hibbit*, and that such examination might be treated as if taken in *Hill* v. *Hibbit*.

The summons having been adjourned into Court,

Mr. *F. Waller*, for the Plaintiff in *Hay* v. *Hill :*—

Without this order we shall be unable to read our evidence in *Hay* v. *Hill* in this suit. No doubt a technical objection will be raised; but the Defendants, practically, can suffer no injury or detriment, for they have actually attended and cross-examined the witness throughout. It will be a great hardship if we are compelled to take our evidence in *Hay* v. *Hill* all over again in this suit.

Mr. *Amphlett*, Q.C., and Mr. *Bedwell*, for the Plaintiff in *Hill* v. *Hibbit*:—

If the Plaintiff in *Hay* v. *Hill* will undertake to pay all the costs of the examination in that suit, we do not object.

[Mr. *Waller* declined to accede to this.]

The object of the two suits is practically the same. *Hill* v. *Hibbit* is instituted merely to ascertain who are the co-heirs and next of kin of the intestate, of whom the Plaintiff in *Hay* v. *Hill* claims to be one. All the Defendants in the former are parties to the latter.

Mr. *A. E. Miller* and Mr. *W. W. Cooper* appeared for Defendants in *Hill* v. *Hibbit*.

SIR W. M. JAMES, V.C.:—

This application is a novelty.

I have no authority to make the order which is asked. One of the conditions under which evidence is taken *de bene esse* is, that it is not to be used unless and until it becomes necessary that it shall be used. It would be altering the whole character of the proceedings in the suit which has been instituted solely for the purpose of taking evidence *de bene esse*, if I were to grant this application.

The summons must be refused with costs.

Solicitor for Miss *Hay*: Mr. *Schultz*.

Solicitors for the Plaintiff: Messrs. *Meyrick, Gedge, & Loaden*.

Solicitors for the Defendants: Messrs. *Duncan & Murton*; Messrs. *Sidney Smith & Son*.

HALDANE *v.* ECKFORD.

V.-C. J.
1869
March 6.

Practice—Production of Documents—Contempt—Form of Summons.

Although a Defendant is in contempt, not for non-payment of costs, but for non-compliance with orders of the Court, he is entitled to take any step required for the purposes of his defence.

A Defendant being in contempt for not having made an affidavit of documents, applied for an order that Plaintiff should make an affidavit of documents:—

Held, that he was entitled to the order, but that the affidavit and production by Plaintiff were to be after an affidavit and production by the Defendant.

After decree a summons requiring an affidavit as to documents by the Plaintiff must specify the points as to which discovery is sought.

ADJOURNED summons, requiring the Plaintiff (one of the executors of the testator in the cause for administration of whose estate the suit was instituted) to make the usual affidavit as to documents.

The testator, whose domicil was an important question in the suit, left assets in *India*, *France*, and elsewhere, and appointed four executors, two of whom were resident in *Jersey*. The *Jersey* executors, although they had appeared in the suit to which they had been made parties as Defendants, declined to obey any orders of the English Court. A receiver had been appointed, and orders had from time to time been made for them to concur with the other executors in executing powers of attorney and other acts, so as to enable the receiver to get in the outstanding estate of the testator. The *Jersey* executors, however, altogether declined compliance with these orders, and consequently were in contempt, and attachments had been issued against them.

Mr. *Eddis*, in support of the summons for documents taken out by the *Jersey* executors, contended that the Defendants, although in contempt, were at liberty to take every step necessary for the purposes of their defence: *Fry* v. *Ernest* (1); *Wilson* v. *Bates* (2).

Mr. *Amphlett*, Q.C., and Mr. *Crossley*, for the Plaintiff, opposed

(1) 12 W. R. 97. 9 Jur. N.S. 1151. (2) 3 My. & Cr. 197.

the summons, and contended that where Defendants were in contempt, not for non-payment of costs, but for not complying with orders which they were perfectly able to comply with, they were not entitled to any indulgence in the shape of discovery: *Hewitt* v. *M'Cartney* (1).

The VICE-CHANCELLOR said that although the contempts committed had been of the most flagrant kind, as these documents were required by the Defendants for the purpose of defending themselves, he had no jurisdiction to refuse the order.

Mr. *Amphlett* having stated that the Plaintiff had already obtained an order on the *Jersey* executors for them to make a similar affidavit as to documents, the following order was made:—

MINUTE:—Let the Plaintiff, within seven days after the applicants shall have made a full and sufficient affidavit as to documents, make an affidavit as to documents. And let the Plaintiff also, within seven days after the applicants shall have produced the documents admitted by them to be in their possession and not privileged, produce the documents admitted by him.

A question having arisen as to the form of the summons, which, though after decree, was worded in the form used before decree, the Vice-Chancellor held that this was irregular, and that after decree such a summons should specify particularly the matters in Chambers as to which discovery of documents was required, and in this case the summons must be confined to documents relating to the inquiries as to domicil and next of kin.

Solicitors: Mr. *William James Myatt*; Messrs. *Lambert & Burgin.*

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(1) 13 Ves. 560.

DAVIES *v.* SEAR.

M. R.
1869
Jan. 21, 22;
Feb. 10.

11 Ch. D 385
— 792-4
12 Ch D 37
48, 58
13 Ch D 804

Apparent Easement—Way of Necessity—Implied Reservation—Notice—Acquiescence.

On the sale of land to a purchaser, who has notice that the adjoining land is to be laid out in building in a manner which will make a right of way over the purchased land necessary to the vendor, such right of way is reserved to the vendor by implication as a way of necessity.

A. purchased from *B.* the lease of a house, part of an estate agreed to be let to *B.* upon building leases. There was an open archway under part of the house, which was described as a "gateway" in the ground plan of the house drawn on the lease, and which, when the buildings on the estate were completed in accordance with the plan of the building agreement, formed the only means of access to a mews behind the house. At the time of the purchase, the buildings not being then completed, there were other means of access to the mews. The assignment contained no reservation of a right of way, but the archway was used as an entrance to the mews until the buildings were completed:—

Held, that a right of way through the archway was reserved to *B.* by implication, the state of the property at the time of the purchase being such as to put *A.* upon inquiry, and fix him with constructive notice of the building plan:

Held, also, that *A.* having stood by and allowed *B.* to build so as to leave no other access to the mews, could not afterwards dispute the right of way.

By a building agreement, made in October, 1865, Messrs. *Yeo & Warner* agreed to grant to *John James Butson* a lease of a piece of land at *Hampstead*, belonging to *Eton College*, of which *Eton College* had agreed to grant them leases, as soon as he had built certain houses and buildings thereon, which he thereby agreed to build according to a plan drawn on the agreement. This plan shewed two rows of houses fronting two roads called *Erskine Road* and *Ainger Road*, and a mews at the back of the *Erskine Road* houses, having stables on each side of it, with an entrance from *Erskine Road*, and no other entrance.

By an indenture, dated the 26th of July, 1866, *Eton College* granted to *Yeo & Warner* a lease of part of the land comprised in the agreement, on which one of the houses in *Erskine Road* had then been built. The land comprised in this lease included the intended entrance to the mews, the upper part of the house being built over this entrance with an archway open at both ends. The lease did not refer to the building agreement between *Yeo & Warner* and *Butson*, but contained covenants by the lessees to complete the house "according to a plan, elevations, and general specifications approved by the surveyor" (of *Eton College*) "in writing," and not to alter or add to the house without the license of the college. Upon the lease was drawn a ground plan of the house, on which the site of the archway was marked as "gateway."

In August, 1866, *Yeo & Warner* assigned the lease to *Butson*, who, in the September following, mortgaged it to *Thomas Lyon*.

In the same September, the Defendant, *Thomas Sear*, purchased from *Butson* the house, then known as No. 2, *Erskine Road*, and premises comprised in the lease of July, 1866. The purchase was not completed until the 30th of March, 1867, when the house and premises were assigned to the Defendant by *Butson* and *Lyon*. The deed of assignment contained no reservation of, or allusion to, any right of way, but a plan was drawn upon it similar to that on the lease of July, 1866.

On the 20th of April, 1867, *Butson* assigned to the Plaintiff, *William Davis*, his interest under the building agreement of October, 1866, in all the premises comprised therein, except those which he had assigned to the Defendant.

The Plaintiff and *Butson* alleged, and the Defendant denied, that the plan annexed to the building agreement of October, 1865, was shewn to or seen by the Defendant before his purchase in September, 1866.

The evidence as to the state of the property comprised in the building agreement at the time of the Defendant's purchase was conflicting, and the result of it was stated by the Master of the Rolls to be as follows:—

In *Erskine Road* the houses were built, and the passage under the house, No. 2, was made leading to the space where the mews were begun. The buildings on the left side of the mews, entering from the archway, were begun, those on the right side were not. Some of the houses in *Ainger Road*, running at right angles from *Erskine Road*, were begun, but there was complete access to the mews across the fields from *Ainger Road*, and lime, brick, and other building materials were constantly carted over the fields. The foot pavement in *Erskine Road* was interrupted opposite the archway, the kerb stone rounded off on each side, and the entrance to the archway paved, as is usual in entrances to mews.

The district surveyor of the Board of Works stated that he surveyed the property in March, 1866, and required *Butson* to put a particular kind of arch over the archway, as it appeared to be the only entrance to the mews.

The Defendant allowed the archway to be used as a passage to the mews until the Plaintiff had built the houses in *Ainger Road*, so as to cut off all access to the mews except through the archway. He then, in November, 1867, obstructed the way through the archway. The obstruction was removed by the Plaintiff, and the Defendant thereon commenced an action of trespass against him. In January, 1868, the Plaintiff instituted this suit to establish a right of way for himself and his assigns, and his and their tenants, during the term of the Defendant's lease, through the archway to and from the mews and stables, and to restrain the Defendant from prosecuting the action of trespass or obstructing the way.

On the 13th of March, 1868, the Plaintiff moved for an injunction, and the motion was ordered to stand over till the hearing of the cause, the Defendant undertaking to give to the Plaintiff free access through the archway and stay proceedings in the action.

The cause now came on to be heard on motion for decree.

The action at law related to other matters besides the removal of the obstruction.

Mr. *Hastings*, for the Plaintiff:—

Upon the assignment by *Butson* to the Defendant there was an implied reservation to *Butson* of a right of way through the archway, such right of way being, to the knowledge of the Defendant, necessary for the enjoyment of the mews. The plan which *Butson* was bound by his agreement to carry out required him so to build as to exclude every other means of access to the mews except through the archway. The Plaintiff's evidence shews that this plan was shewn to the Defendant before his purchase. But whether this were so or not is immaterial, for the Defendant had implied notice of it from the reference to a plan in the covenant in the lease of his house, and from the word "gateway" in the plan on the lease, and also from the state of the property at the time of his purchase. This

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being so, the case is governed by your Lordship's decision in *Suffield* v. *Brown* (1), which shews that if a purchaser buys with notice that an easement over the purchased property is necessary for the enjoyment, in its then state, of the property retained by the vendor, the purchaser cannot dispute the reservation of the easement on the ground that is not expressly reserved by his conveyance. The decision in that case was reversed on appeal (2), the Lord Chancellor considering that the easement there in question was neither apparent nor continuous, and consequently not one of which a purchaser would necessarily have notice; but the principle of the decision was not affected by the reversal. *Pyer* v. *Carter* (3) is a clear authority for the implied reservation of an apparent easement, and that case has been recognised as law by the House of Lords in *Ewart* v. *Cochrane* (4), and it was treated as a binding authority by this Court in *Morland* v. *Cook* (5), and by the Court of Exchequer in *Hall* v. *Lund* (6).

Mr. *Southgate*, Q.C., and Mr. *Wickens*, for the Defendant:—

This is not a question of implied contract, but of an implied reservation of an easement. There can be no implied reservation of a right of way, except in the case of a way of necessity—that is to say, where the grantor has other land to which there is at the time of the grant no other access except over the land granted. In any other case such a reservation would be a derogation from the grant. Here at the time of the Defendant's purchase there was complete access to the mews from *Ainger Road*. The intention of the grantor so to build on his land as at a future time to leave no other access to some part of it except over the land granted, even if the grantee had express or implied notice of such intention, would not create an implied reservation of a right of way. In this case, however, the Defendant denies that he had any such express notice, and he was not bound to assume that *Butson* would not alter his plan so as to give another access to the mews.

As to the authorities: in *Pyer* v. *Carter*, and *Ewart* v. *Coch-*

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(1) 9 Jur. (N.S.) 999; 33 L. J. (Ch.) 249.

(2) 10 Jur. (N.S.) 111; 33 L. J. (Ch.) 249, 256. 4 De G. J. & S. 185

(3) 1 H. & N. 916.

(4) 4 Macq. 117. 7 Jur. N.S. 925

(5) Law Rep. 6 Eq. 252.

(6) 1 H. & C. 676.

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rane (1), the easement was apparent and continuous, and those cases have no application to a right of way: *Dodd* v. *Burchell* (2). The decision of the Lord Chancellor in *Suffield* v. *Brown* (3) is fatal to the Plaintiff's contention, and his observations on *Pyer* v. *Carter* (4) shew that the principle of that case will not be extended.

Worthington v. *Gimson* (5) shews that mere convenience of enjoyment without actual necessity will not create an implied reservation of a right of way.

[They also referred to *Plant* v. *James* (6), *Thomson* v. *Waterlow* (7), and *Langley* v. *Hammond* (8).]

Mr. *Hastings*, in reply:—

Even if the Defendant could immediately after his purchase have disputed the right of way, he will not now be allowed to dispute it in a Court of Equity after standing by and allowing the Plaintiff to complete the buildings so as to exclude all other access to the mews: *Dann* v. *Spurrier* (9).

In *Dodd* v. *Burchell*, and each of the other cases cited for the Defendants, there was another way. In this case the vendors were compelled by their covenant with their lessors to build in such a manner as to leave no other way, and therefore the way was, in fact, a way of necessity.

Feb. 10. Lord Romilly, M.R., after stating the facts, continued:—

The question is, whether the Defendant has a right to shut up the archway, and to intercept all access to *Erskine Mews* through this passage. This depends upon whether this easement is reserved by implication on the assignment of the house to the Defendant; and this depends upon whether the easement is apparent, and also is a way of necessity. That this is the law is, I think, settled by 12 C L R a great number of cases which were cited to me in the course of the argument, and to which I think it unnecessary further to refer. Whether this was so or not in the present case, or how the Defendant is affected, is a matter which depends on the evidence shewing the state of the property and the notice which the Defendant had when he bought the house. The state and condition of the property was this:— [His Lordship stated the result of the evidence as to this, as above, and continued:—] In that state of things it is contended, that to argue that this way through the archway was a way of necessity is absurd, as other means of access could be, and were, used; but notwithstanding the apparent plausibility of this argument, I am of opinion that this is, and was, a way of necessity; that it was apparent that it was, that the Defendant had notice that it was, and that it is not in his power to dispute that it was. In the first place, he saw distinctly the archway; he bought the house subject to the archway; for what purpose did he suppose that the archway was made, unless as a mode of access? He contends now that he can build up the archway and throw it into his house; but it is obvious that without the consent of the landlords (*Eton College*), even if all other rights be disregarded, this could not be done. He could hardly believe that the archway was meant as an ornament, without use to any one. The footpavement was interrupted, the kerb-stone rounded off on each side, and the entrance paved, as is usual in entrances into mews. The mews themselves were then in course of erection, and one side had been, if not completed, at least sufficiently erected to shew the scope and plan of the building. In my opinion, if he claimed, or intended to claim, the right of stopping this passage he was set on inquiry as to the mode in which, under the lease from the College, the lessees were bound to perform, or were about to perform, the building contract they had entered into. The slightest inspection of the plan would have shewn him that the way under the archway was to be the only way to the mews when the design was completed. Did the Defendant do anything? Nothing at all; he sees the houses in *Ainger Road* gradually rising, he sees the other side of the mews erected, he sees the access at the extremity barred by a wall—it is not pretended that the plan was altered to injure or exclude him—and when all this is done, he says this way may be a way of necessity now, but till the buildings and houses were completed it was not so, you might have driven across the fields, and therefore I had no notice. I think that this is not language which a Court of Equity will allow a Defendant, situated in the position of this Defendant, to use. It is obvious that unless he wilfully shut his eyes he must have seen that the plan gradually proceeded on the principle that this way through the archway was to be the only mode of access to the mews. Indeed, the nature of the intended access was so obvious, that the district surveyor, in March, 1866—a year previously—considered it obvious that this would be the only access to the mews, and acted on that assumption. I agree with the observation of counsel, that the case of *Dann* v. *Spurrier* (1) and the other cases of that class apply. A man cannot take the assignment of the lease of a house having an archway and road under it leading to a mews, and abstain from looking at the plan by which the adjoining ground is laid out and intended to be built upon; he cannot stand quiet, and see it gradually become covered with houses, so that every access or means of communication with the mews is shut out except this one, which he had always known was intended to be used as a means of access, and then say "this easement was not reserved, although there was an archway and road under the house." It does not lie in his mouth to say: "I did not understand that you intended to use this mode of access, and still less did I understand that you intended to close all other means of access, and leave this as the only existing one." This is a case in which the slightest inquiry, or the most casual observation, would have shewn the Defendant—if, indeed, he did not all along, as I believe he did know—what was intended. It is quite settled that it is immaterial whether the dominant tenement or the servient tenement is conveyed first; and, in my opinion, when a man buys a house in a street or road, with an archway occupying the position of thirteen feet of the ground floor, with a direct paved road under it, and an interrupted foot pavement on each side, being all the marks of a road leading to mews, he is put on inquiry as to what other means of access there are to the mews; and if the whole space behind is vacant, and unbuilt upon, he is put on inquiry to ascertain whether the plan for laying out the ground

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(1) 4 Macq. 117. 7 Jur NS 925.
(2) 1 H. & C. 113.
(3) 33 L. J. (Ch.) 249, 256. 10 Jur NS 111
(4) 1 H. & N. 916.
(5) 2 E. & E. 618. 6 Jur NS 1053.
(6) 5 B. & Ad. 791; 4 Ad. & E. 749.
(7) Law Rep. 6 Eq. 36.
(8) Ibid. 3 Ex. 161.
(9) 7 Ves. 231.

(3) S C 4 De G J & S. 185

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(1) 7 Ves. 231.

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will give any other means of access to the mews except through and under this archway. I am of opinion that the injunction against the Defendant must be made perpetual, and that the costs must follow the event. That the Plaintiff was wrong in the motion he made is admitted, and the costs of that motion must be borne by him, and set off against the other costs. With regard to the action of trespass, I think both parties would do well to stay all further proceedings in it; but if, as it is said, it is independent of the question of right of way, I will allow it to proceed for the purpose of assessing the damages sustained, if, in fact, any have been sustained; this I will allow the parties themselves to determine; but it must be understood that no question of right will be determined, and that the proceedings will be subject to the perpetual injunction I decree to restrain the stopping the passage under the archway to the mews.

Solicitor for the Plaintiff: Mr. *G. F. Mant.*

Solicitors for the Defendant: Messrs. *Underwood & Colman.*

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March 5, 8.

In re TANN.
TANN *v.* TANN.
GRAVATT *v.* TANN. (1.)

Agreement for Partition—Death of Co-owner—Costs of Partition.

A. and *B.* being entitled to fourteen freehold houses as tenants in common in undivided moieties, entered into an agreement for partition, by which *A.* was to take and hold in severalty seven of the houses, and *B.* the other seven. Both died before a deed of partition was executed. *A.*, who was the survivor, specifically devised the seven houses agreed to be held in severalty by him, but allowed the legal estate in one moiety of the other seven houses to devolve on his heir-at-law:—

Held, that the costs of carrying the agreement for partition into effect (including the costs incurred in getting in the outstanding legal estate) must be borne by the devisees of *A.*, and not by his personal estate.

IN 1831 fourteen freehold houses were purchased by *Edward Tann* and *James Lill,* and were conveyed as to one undivided moiety to the ordinary uses to bar dower in favour of *Edward Tann;* and as to the other undivided moiety to the like uses in favour of *James Lill*. Shortly afterwards an agreement for partition appeared to have been verbally entered into between them, by which *Tann* was to take and hold in severalty seven of the houses, and *Lill* the other seven. In pursuance of this agreement *Tann* and *Lill* respectively entered into possession and receipt of the rents of seven houses, and so held them up to the times of their respective deaths; but no deed of partition was ever executed by them. *Lill* predeceased *Tann*, and the latter, by his will, devised three of the seven houses of which he was in possession to *James Tann*, and the remaining four to *John Tann;* and he appointed *James* and *John Tann* executors. The legal estate in one moiety of the seven houses of which *Lill* took possession did not pass by *Edward Tann's* will, but devolved on his heir-at-law. After *Tann's* death, a deed of partition was executed by all parties interested in the property; and *James* and *John Tann* incurred considerable expense in reference thereto, and particularly in getting in the outstanding legal estate.

A suit for the administration of *Edward Tann's* estate having been instituted, *James* and *John Tann*, in the accounts rendered by them as executors, charged the expense so incurred by them against the testator's personal estate; but the item was disallowed by the Chief Clerk. The matter was now brought before the Court on a summons to vary the Chief Clerk's certificate.

Mr. *Jessel*, Q.C., and Mr. *F. H. Colt*, for *James* and *John Tann*:—

The expense has been incurred in carrying into effect a contract by which the testator was bound, and ought to be borne by the testator's estate. If the testator had contracted to sell the property, the expense of carrying the contract into effect would have fallen on the personal estate. Why should it be different where the contract is for partition?

[They referred to *Cooper* v. *Jarman* (1).]

Mr. *Southgate*, Q.C., and Mr. *Wickens*, for the parties having the conduct of the suit, were not called upon.

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(1) Law Rep. 3 Eq. 98.

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1869
In re TANN.
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GRAVATT v. TANN. (1.)

LORD ROMILLY, M.R.:—

I think the Chief Clerk was right. The testator devised this property to the devisees; there was an agreement for partition by which the devisees were bound; and I think that the testator meant that the costs of conveyance should be a charge on the property.

Solicitors: Messrs. *Langley & Gibbon*; Mr. *J. A. Rose*.

M. R.
1869
March 8, 15.

In re TANN.
TANN *v.* TANN.
GRAVATT *v.* TANN. (2.)

Administration Suit—Partial Distribution of Estate—Costs.

4 Ch D 391
— 843.
22 Ch D 102

The executors of a testator accounted for the residuary estate to such of the residuary legatees as were adults; and, after setting apart a portion of such estate as an indemnity fund against certain possible claims, they paid the adult legatees their shares of the residue, they retained their own shares, and they invested the share of each infant legatee in their own names and the name of the infant entitled thereto. Afterwards an administration suit was instituted on behalf of certain of the infants, the result of which was to establish the substantial accuracy of the accounts rendered by the executors:—

Held, that the costs must be paid out of the undistributed residuary estate; that neither the residuary legatees who had been paid their shares, nor, in the first instance, the executors, were to receive any costs unless they respectively accounted for the shares they had received or retained, and contributed to the costs; but that after payment of the costs of the Plaintiffs, and any other parties entitled thereto, out of the indemnity fund (which had been brought into Court), the surplus thereof should be paid to the executors towards payment of their costs.

EDWARD TANN, by his will, dated the 19th of September, 1859, made devises and bequests in favour of a considerable number of persons, including his sons *James* and *John Tann*, and his daughter *Ellen Gravatt*, and he also made bequests in the following terms: "I give and bequeath unto my grandchildren, each and every one of them, namely, the child of my late son *Edward Tann*, the children of my late son *George Tann*, the children of my son *James Tann*, the children of my daughter *Ellen Gravatt*, the children of my son *John Tann*, the children of my daughter

Clarissa Gravatt, and the child of my late daughter *Amelia Cousins* —£50 of lawful British money, to be paid to each of them as they each come to be twenty-one years of age, by my executors hereinafter named." And the testator gave his residuary estate unto the whole of the legatees under his will (except a certain charity) to be divided among them as therein mentioned; and he appointed *James* and *John Tann* executors. The testator died on the 9th of November, 1862.

In addition to the children mentioned in the bequest above set forth, the testator had a son *Charles Tann*, deceased at the date of the will, whose children were believed to be resident in *Australia*. Upon the division of the testator's estate a question was raised whether, upon the true construction of the clause above set forth, these grandchildren were entitled to participate in the bequests contained in the will; and it was arranged between the executors and the adult grandchildren of the testator, that the estate of the testator should be distributed without reference to any claim of the children of *Charles Tann*, and a sum of £10 should be deducted from the legacy given to each of the grandchildren whose parent was named in the will, so as to form a fund which was to be invested in the names of the executors, and held by them for twenty years, as an indemnity against any such claim. Accordingly the estate of the testator was distributed on this footing.

Exclusive of the children of *Charles Tann* fifty-five persons were interested in the residuary estate of the testator, of whom thirty were adults on the 2nd of March, 1864; and these thirty persons executed a release, bearing date that day, to the executors in respect of their dealings with the estate. Six other persons, who afterwards came of age, subsequently received their shares and executed the deed.

The share of each infant grandchild (including the legacy of £50) amounted to £65 7*s.* 6*d.*; and after deducting from each such share £10 as a contribution towards the indemnity fund, the residue thereof was invested in the purchase of New 3½ per Cent Annuities, in the names of the executors and the grandchild entitled thereto; and the dividends as they accrued due were paid in to accounts opened in the like names in the *Post Office Savings Bank.*

On the 2nd of June, 1866, the suit of *Gravatt* v. *Tann* was instituted by six infant children of *Thomas* and *Ellen Gravatt* by *L. J. M'Creary* their next friend. *Thomas* and *Ellen Gravatt* had executed the release of the 2nd of March, 1864; and no charge was made against the executors of refusing to produce their accounts, or improperly dealing with the trust estate. In July, 1866, the executors put in an answer, stating the facts set out above. Some delay took place in the prosecution of the suit; and on the 7th of January, 1867, the ordinary administration decree was made upon a summons taken out by other persons interested in the estate. On the 7th of March, 1867, an order was made staying all proceedings in *Gravatt* v. *Tann*, but giving the conduct of the proceedings under the decree to the Plaintiffs in that suit.

The result of the accounts and inquiries was, that the accounts rendered by the executors were found to be substantially correct, the items disallowed amounting only to £29 8*s*. 6*d*. The cause now came on upon further consideration, and the question was, how the costs were to be borne.

Under an order of Court the indemnity fund, amounting to £400, had been paid into Court.

Mr. *Southgate*, Q.C., and Mr. *Wickens*, for the Plaintiffs in *Gravatt* v. *Tann*, asked that the costs might be paid out of the fund in Court.

Mr. *Jessel*, Q.C. (Mr. *F. H. Colt* with him), for the executors, submitted that inasmuch as nothing had been gained by the suit in any way, the costs ought to be paid out of the shares of the Plaintiffs in *Gravatt* v. *Tann*: *Mackenzie* v. *Taylor* (1); *Thompson* v. *Clive* (2).

Mr. *Langley*, Mr. *Higgins*, and Mr. *R. W. E. Forster*, for other parties.

Mr. *Southgate*, in reply, cited *Holgate* v. *Haworth* (3).

March 15. LORD ROMILLY, M.R.:—

The only question I have to decide is, how the costs are to be borne. I think the costs must come out of the estate; that is to say, I cannot make the residuary legatees who have received their shares pay anything back; but if any of them wishes to have his costs he must bring in and account for the share he has received, and contribute to the costs.

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(1) 7 Beav. 467. (2) 11 Beav. 475. (3) 17 Beav. 259.

Mr. *Jessel*:—Will that apply to the executors?

LORD ROMILLY:—Yes. The executors must pay into Court the amount of the items disallowed; and the costs of the Plaintiffs, and any other persons who may be entitled to them, will be paid out of the money so paid in, and the fund already in Court. Any surplus which may remain after payment of these costs will go towards payment of the executors' costs; I think they are entitled to that. If they choose to bring in and account for the shares of the residuary estate they have retained for themselves, they will, of course, be entitled to their costs, charges, and expenses.

Solicitors: Mr. *J. A. Rose*; Messrs. *Langley & Gibbon*; Mr. *T. F. Peacock*.

EYTON *v.* DENBIGH, RUTHIN, AND CORWEN RAILWAY COMPANY.

M. R.
1869
March 15.

Railway Company—Rent-charges—Debentures—Priority.

The holders of rent-charges created by a railway company under sects. 10 and 11 of the *Lands Clauses Act*, and charged on the undertaking of the company, have a first charge on the lands of the company comprised in the deeds of charge, and are entitled to have their rent-charges paid out of the net earnings of the undertaking in priority to debenture holders.

BY an indenture dated the 23rd of October, 1862, *Mary Eyton*, widow, conveyed to the *Denbigh, Ruthin, and Corwen Railway Company*, their successors and assigns, certain lands to which she was beneficially entitled, and which were required by the company for the construction of their line; and the company by the same indenture granted to *Mary Eyton*, her heirs, appointees, and assigns, a yearly rent-charge of £47 per annum, charged upon the whole of the undertaking of the company and issuing out of all the lands and tenements comprised in the indenture, payable by equal half-yearly payments on the 23rd of January and the 23rd of July in every year.

The company made several other purchases of lands in consideration of rent-charges; and they also borrowed considerable sums on debentures, and became indebted to many persons in respect of simple contract debts. Some of the simple contract creditors recovered judgment against the company.

Under these circumstances *Mary Eyton's* rent-charge fell into arrear, and she filed the bill in this suit on behalf of herself and all other persons entitled to rent-charges created in respect of purchases of lands by the company, who should come in and contribute to the costs of the suit, against the company, and *John Gaman, John Tatlock,* and *Charles Backhouse Robinson* (who were made parties as representing the judgment creditors and debenture holders), for the purpose of enforcing her charge.

By the decree made at the hearing on the 17th of January, 1868, the following inquiry was directed amongst others:—viz., an inquiry what property was liable to the rent-charges granted by the company, and what other incumbrances affected such property, and what were the respective priorities of such incumbrances, including the said rent-charges.

The Chief Clerk found that the property liable to the rent-charges respectively was mentioned and described in the deeds creating such rent-charges respectively; but, at the request of the parties, and for the sake of avoiding expense, he did not describe such property in detail. He also found that except so far as the debentures issued by the company and the judgments recovered against the company affected the property comprised in such deeds, there were no other incumbrances affecting the same. Nothing was said in the certificate as to the priorities of the incumbrances. The cause now came on to be heard on further consideration.

Sir *R. Baggallay*, Q.C., and Mr. *A. E. Miller*, for the Plaintiff, asked for a declaration that the owners of the rent-charges mentioned in the Chief Clerk's certificate were entitled to a charge upon all the lands of the company, and all the earnings and profits of the company, in priority to all other the creditors of the company, and that as between themselves they were entitled to be paid such rent-charges *pari passu.*

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Mr. *Bevir*, and Mr. *Fischer*, for the Defendants representing the judgment creditors and debenture holders, submitted that the holders of rent-charges were only entitled to be paid out of the earnings and profits of the undertaking *pari passu* with the debenture holders. The rent-charges were created under sects. 10 and 11 of the *Lands Clauses Act*, and there was nothing in those sections to give them priority over the debentures.

Mr. *Dryden*, for the company, submitted that the holders of rent-charges were not entitled to a charge upon all the lands of the company, but only upon the lands respectively comprised in the deeds creating the rent-charges.

LORD ROMILLY, M.R.:—

I am of opinion that the holders of rent-charges have priority over the debenture holders. In the first place these rent-charges are given instead of money in payment for the land required for the construction of the line. Whenever a person sells land he has a charge on it for his unpaid purchase-money; and I do not think that these clauses of the *Lands Clauses Act* were intended to deprive vendors of any such charge. But the holders of these rent-charges have no charge on other lands which they have not sold. Then as to the earnings of the undertaking, I think the rent-charges have also priority, because they represent the price of land, without which the line could not have been made, whereas debentures are only issued in exercise of the borrowing powers.

There is therefore no need of any further inquiry as to priority, and I am of opinion that the persons who hold rent-charges have a first charge on the lands which they sold and on the undertaking of the company, that is to say, on the net earnings, after paying in the first place what is necessary to maintain and work the line; but that they have no charge on the lands of the company except those sold by them.

The declaration made was:

"That the owners of the several rent-charges mentioned in the Chief Clerk's certificate are entitled to a charge upon all the lands of the company comprised in their several deeds of charge, and upon all the earnings and profits of the under-

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taking of the company, in priority to all other the creditors of the company, and that they are, as between themselves, entitled to be paid such rent-charges *pari passu.* And that the holders of the several mortgage debentures mentioned in the Chief Clerk's certificate are entitled to a charge upon all the profits of the undertaking of the company, in priority to all the other creditors of the company, except owners of the said rent-charges, and that they are, as between themselves, entitled to such charges *pari passu.*"

Solicitors: Messrs. *Rooks, Kenrick, & Harston*; Mr. *Lawson*; Messrs. *Chester & Urquhart*; Mr. *Noyes.*

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Feb. 18, 19.

10 Eq 115.
4 WN (69) 90
17 WR 1079
20 Eq 582
1 Ch D. 393.
23 Ch D 574

MADRID BANK *v.* PELLY.

Company—Directors—Promotion-money payable on Allotment—Premature Allotment—Payment to Directors by Promoters—Costs.

The articles of association of a banking company, with a nominal capital of £1,200,000 in 60,000 shares, of which the prospectus stated that the first issue would be 30,000, empowered the directors to commence business as soon as they should think fit, notwithstanding the whole capital might not have been subscribed for, and provided that upon the first allotment of shares £10,000 should be paid to the promoters. When only 5000 shares had been subscribed for, and before the company was in a situation to commence business, the directors allotted the shares and paid £5000 to the promoters, who immediately paid to four of the directors £500 apiece. The company having been ordered to be wound up:—

Held, in a suit by the official liquidator in the name of the company against the directors, to which the promoters were not parties, that the directors could not be charged with the money paid to the promoters, but that each of the four directors must repay to the company the £500 received by him from the promoters.

Where a company in course of liquidation is ordered to pay costs, such costs are not to be proved as a debt in the winding-up, but are payable in full out of the assets of the company.

THE *Madrid Bank, Limited,* was incorporated on the 13th of May, 1863, under the *Companies Act,* 1862, as a limited company, with a nominal capital of £1,200,000 in 60,000 shares of £20 each. The prospectus stated that the first issue would be 30,000 shares, and that £1 per share would be payable on application and £1 per share on allotment. The objects of the company were stated by the memorandum of association to be the transacting of banking business in *London*, and, by means of banks, branch banks, or agencies, at other places in the *United Kingdom*, and in *Spain* and its colonies and dependencies, and elsewhere.

By the articles of association, Messrs. *Daniell, Chapman, Turck, Dumas, Pelly*, and *Venning*, were appointed the first directors, and *George Williams*, one of the promoters of the company, was appointed the first director-general of the company at *Madrid;* the directors were empowered to commence the business of the company as soon as they should think fit, notwithstanding the whole capital might not have been subscribed for; and it was provided, that when and so soon as the allotment of shares under the first issue should take place, the directors should pay to the promoters of the company £10,000, in full of all charges incurred by the promoters, either on their own behalf or on behalf of the company, prior to the day on which such allotment should be made.

On the 29th of June, 1863, the directors made an allotment of shares.

At that time about 5000 shares had been subscribed for in *England*, of which each of the directors, except *Dumas*, had subscribed for 200, and about £5000 was standing to the credit of the company at their bankers. The directors had applied for a concession from the Spanish government for the company to carry on a bank at *Madrid*, and had been informed by *George Williams* that 15,000 shares had been subscribed for in *Spain*, and that £12,600 must be deposited as caution money in order to obtain the concession.

On the 6th of July, 1863, the directors, at a meeting at which all except *Dumas* were present, resolved to pay £5000 to the promoters, and the payment was made on the same day. At the same time the promoters paid to four of the directors, *Daniell, Turck, Chapman*, and *Pelly*, £500 apiece, but these payments were not known to *Venning* or *Dumas*.

In June, 1864, the directors, at a meeting at which all except *Dumas* were present, resolved to pay a further sum of £2000 to the promoters, which was paid accordingly.

The company obtained a concession from the Spanish government in April, 1864, but no shares were subscribed for in *Spain*, and no more shares were subscribed for in *England* after the first allotment. The company did scarcely any business, and in March, 1865, was ordered to be wound up.

The promoters brought in a claim in the winding-up for £3000, the balance of the £10,000 payable to them under the articles, but the claim was disallowed by the Court: *Ex parte Williams* (1). *Smith*, the secretary of the company, who was one of the promoters, and *J. E. Williams*, another promoter, in cross-examination upon their affidavits in support of that claim, stated that the payment to the four directors was made in pursuance of an agreement made by *Smith*, on behalf of the promoters, with *Daniell*, and their evidence was made evidence in this suit.

After the disallowance of the claim of the promoters the official liquidator instituted this suit against all the directors, asking for a declaration that the payment of the £7000 to the promoters was a misapplication of the funds of the company, and for the repayment of that sum by the Defendants, and for the repayment, at all events, by each of the four directors of the £500 paid to him by the promoters.

Pelly, *Chapman*, and *Turck*, by their answers, stated that the £500 paid to each of them by the promoters was not paid under any agreement between them and the promoters, but was a spontaneous gift.

Daniell was made a Defendant, but was out of the jurisdiction of the Court, and had not been served.

Mr. *Roxburgh*, Q.C., and Mr. *E. James*, for the Plaintiffs:—

The Defendants are trustees for the shareholders: *Turquand* v. *Marshall* (2); and are chargeable with the whole of the money paid to the promoters, unless they can shew that the promoters were entitled to receive it. But the Court has already decided in *Ex parte Williams*, that, although by the articles the promoters would have been entitled to receive £10,000 upon the first allotment of shares, if the allotment had been made by the directors in the *bonâ fide* exercise of their discretion, yet that, under the circumstances, the allotment could not be treated as having been made *bonâ fide*, and the promoters could not insist upon the performance of the contract. The four directors who were to receive money from the promoters were incapacitated from exercising a *bonâ fide* judgment as to the propriety of allotting the shares, and the other two directors ought not to have sanctioned the allotment, and the consequent payment of promotion-money, at a time when so few shares had been subscribed for, and no concession had been obtained in *Spain*. *Dumas*, though he did not attend the meetings, was bound to know the affairs of the company, and is liable for the acts of his co-directors: *Turquand* v. *Marshall* (1).

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(1) Law Rep. 2 Eq. 216.

(2) Law Rep. 6 Eq. 112; 4 Ch. 376.

As regards the four directors, it is clear that they ought to refund the money which they received. When a director shares with a stranger the benefit of a bargain made between the stranger and the company, the director's share belongs to the company: *In re Brighton Brewery Company* (2).

The Master of the Rolls:—I am not going to make any decree as to the £5000 and £2000 in this suit, to which the promoters who received the money are not parties.

Sir *R. Baggallay*, Q.C., and Mr. *Eddis*, for *Pelly* and *Chapman*:—

The proceedings of the directors were perfectly *bonâ fide*. At the time of the allotment 5000 shares had been subscribed for within two months from the formation of the company, and the directors were told that 15,000 shares would be taken in *Spain*. In order to start the bank in *Madrid* a concession was required, and £12,600 was wanted for that purpose. The allotment of shares was, under those circumstances, proper, and the subsequent failure of the company has nothing to do with the question. Each of these directors had subscribed for 200 shares, and it cannot be supposed that they would make an allotment of shares, making themselves liable for £4000 apiece, merely for the sake of getting £500 apiece out of the promotion money. But in fact both *Pelly* and *Chapman* positively deny the existence of any agreement between them and the promoters, and the evidence of *Smith* and *Williams* only proves an agreement with *Daniell*. We may admit that if the money had been paid to them in pursuance of a previous agreement, they must have refunded it to the company; but if the promoters chose to make them a present of £500 apiece,

(1) Law Rep. 6 Eq. 112; 4 Ch. 376. (2) 37 L. J. (Ch.) 278.

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the company have no more right to that than they would have to a legacy bequeathed by a promoter to a director.

Mr. *Southgate*, Q.C., and Mr. *Renshaw*, for *Venning*.

Mr. *Higgins*, for *Dumas*.

Turck did not appear.

LORD ROMILLY, M.R.:—

I think that the bill must be dismissed with costs against *Venning* and *Dumas*. As regards the other Defendants I will read the evidence, and state to-morrow whether I think it necessary to hear a reply.

Feb. 19. LORD ROMILLY, M.R.:—

I shall not trouble you in this case, Mr. *Roxburgh*, because what I said on the former occasion, when this matter was before me, applies entirely to the present case. The facts of the case, which are not denied, are these:—that there was £10,000 to be paid to the promoters; it was well known that this £10,000 was to be paid to the promoters as soon as the allotment of shares was made, and the allotment of shares was to be made when they were in a situation to carry on the business. Therefore three things were necessary; first, that they should be in a situation to open the bank and carry on the business; secondly, that they should also thereupon allot shares; and thereupon, in the third place, they were to pay this money to the promoters. What took place was this: they did not at first get the concession from *Spain*; until this was done the concern could not proceed, for it is to be observed that the very essence of the company was to make it a bank having connection with *Spain*, a bank which should be a Spanish and English bank, carrying on business at *Madrid* and *London*; their object was not to form a mere joint stock bank in *London*. They did not get the Spanish concession until April, 1864. In June, 1863, nine months before that, as soon as they had got a little money, they determined to allot shares, when they had only got in round numbers

5000 shares taken; when they had got in money very little more than £5000, they gave £5000 to the promoters at once.

It seems to be a strange proceeding, and one that requires to be looked into, that they should begin business before they had got the concession from *Spain*, and before they had got capital enough to carry on the business. It is true they could acquire fresh capital by making fresh calls, but it is exceedingly unpopular to do so in the case of a bank. The object is to carry it on with as small an expense as possible. Then, out of the £5000 so paid the promoters paid to four of the directors, who ordered the payment to be made, £500 apiece. That took place forthwith. Now it is very properly admitted by Sir *Richard Baggallay* and Mr. *Eddis*, that if the payment of the promotion-money was made for the purpose, or with the knowledge, or under an agreement that this payment would be made to the directors, it is a transaction which cannot be supported. They could not properly pay money to the promoters in order that they might get £500 apiece. They state in their answers that this was in fact mere bounty, unexpected bounty, on the part of the promoters, who, out of pure gratitude and good will, gave them this large sum of £500 apiece. It would require strong evidence to establish so improbable a circumstance. But really the question is disposed of by the deposition of Mr. *Williams*, who states that it was expressly agreed to. The combination and the simultaneousness of the acts afford evidence that the whole matter was one transaction between them. If it were perfectly true that no arrangement was made at all, but that it was out of mere bounty and good will that the promoters thought fit to do this, then the directors should have said to them, "The mere fact that we are directors, and that you could not have obtained the money except by our order, makes it impossible for us to receive anything." No absence of agreement will justify such a transaction as this, where there is that particular kind of relation between the parties. In point of fact, it is impossible to suppose that the promoters would voluntarily have paid out of their own money £500 apiece to four gentlemen, of whom they knew very little, except that they were directors of this company, and with whom they had no particular reason to be friendly except for the advantage they had done them in making this payment to them. Then we find that this payment is made at a time when the company was not in a situation to carry on business, when it was not in a situation to do more than just to pay the preliminary expenses required for carrying the bank into operation. When this money is paid, they receive this £500 each without the fact being imparted to the rest of the shareholders of the company. I am of opinion that this case is governed by what I stated on the former occasion, when I disallowed the claim of the promoters to get the £3000. Many of my observations apply to this case also, and it is also governed by what I did in the case of the *Brighton Brewery Company* (1), which is exactly similar to this. This is, in fact, dividing money which was properly the money of the shareholders, and not the money of the promoters at all. If the promoters thought fit to take £3000 instead of £5000, or £8000 instead of £10,000, that was a matter of which the shareholders must have the advantage, and the advantage cannot go to these directors who thought fit to take it, and in respect to whom it is obvious, that the leading motive for the rapid allotment of shares and payment of the promotion-money was the repayment of this sum to them.

I fully admit the argument that they did not take 200 shares each and incur this liability for the purpose of getting £500. No doubt, they entered into the transaction with the belief that the company would succeed, but before they could ascertain whether it would succeed, before they could ascertain that it was upon such a footing as to justify the payment, in order to obtain this £500 they paid the promotion-money, and they got the £500 in return. If they had inquired a little more accurately into the matter they would have found that all the communications from *Madrid* were fallacious, that there was not a single share taken at *Madrid*, that there was no likelihood of a single share being taken at *Madrid*, and that the whole idea and attempt to form a bank at *Madrid* would entirely fail. I am of opinion, therefore, that an order must be made that these three gentlemen pay £500 apiece. The fourth is not made a party, which is unfortunate; if he had been made a party, the Plaintiffs would have been entitled to have

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(1) 37 L. J. (Ch.) 278.

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taken the bill *pro confesso*, and obtained it from him, but as he is not a party, I cannot make any decree against him. I am of opinion that the bill must be dismissed with costs against Mr. *Dumas*. I find nothing at all to affect him. He appears to me to have come out of the matter not only without any receipt of money, but without any taint of any description. I do not think there is anything to affect his character in the slightest degree. The same observation applies to Mr. *Venning*, and the Plaintiffs must pay his costs also; but I cannot allow them to add those costs to their own. The other three Defendants must pay the costs of the suit, except so far as those costs have been augmented by making a case against *Dumas* and *Venning*.

Mr. *Higgins*:—As to the payment of our costs: there is a question sometimes before the Registrar, whether costs against a company in a winding-up are to be paid by the liquidator out of the assets, or are merely the subject of proof, as in the case of an ordinary creditor.

LORD ROMILLY:—He must pay the costs out of the assets. You have not to prove for the costs.

Solicitors for the Plaintiffs: Messrs. *Treherne & Wolferstan.*

Solicitors for the Defendants: Messrs. *Flux, Argles, & Rawlins;* Messrs. *G. S. & H. Brandon.*

In re NEW ZEALAND BANKING CORPORATION.

LEVI & CO.'S CASE.

M. R.
1869
March 22, 23, 24.

Bill of Exchange—Insolvency of Drawer and Acceptor—Deposit of Securities—Ex parte Waring.

L. deposited certain securities with a company upon an agreement that the company might sell them and apply the proceeds in reimbursing themselves any money owing by *L.* to them. Subsequently the company accepted bills for *L.*'s accommodation. Afterwards, before the bills were paid, the company went into liquidation, and *L.* made an assignment for the benefit of his creditors. The only liability of *L.* to the company was in respect of these bills:—

11 Ch D 92.

Held, that *Ex parte Waring* (1) did not apply, and that neither the bill holders nor *L.* were entitled to have the proceeds of the sale of the securities applied in payment of the bills.

THIS was an application in the winding up of the *New Zealand Banking Corporation, Limited*, on the part of *Overend, Gurney, & Co., Limited*, and the trustees of the estate of *Philip Levi & Co.*, that the liquidators of the corporation might be ordered to pay a sum of £2801 14*s.* 2*d.* (being the balance in their hands arising from the realization of certain securities deposited with the corporation by *Levi & Co.*) to *Overend, Gurney, & Co.* and the *London & Westminster Bank* as the present holders of certain bills, to meet which the securities were alleged to have been deposited.

The firm of *Levi & Co.* carried on business as merchants in *London*, and at *Adelaide*, in *South Australia*. In November, 1865, they applied to the corporation to give them a credit to the extent of £6000, which was granted upon the terms expressed in a memorandum of the 29th of that month. The material portions of this memorandum are the following:—

"In consideration of your granting us a credit to be availed by your acceptances at ninety days' sight in favour of such persons as we shall nominate for that purpose, renewable from time to time for a period of six months from this date, for a sum not exceeding £6000 current at any one time, on the under-mentioned securities, we hereby engage to keep you out of cash advance at any time in respect of the said credit, and to furnish you with cash sufficient to meet the bills so to be accepted by you, or any renewal thereof, at least two clear days before the same shall respectively become due and payable; we also engage to pay you commission on acceptance of any bill or bills under the said credit at the rate of £3 per cent. per annum on the amount so accepted, and on each renewal thereof; and we hereby engage that if at any time you shall be compelled to make a cash advance by reason of our default in providing funds to meet the said acceptances as they respectively arrive at maturity, we will pay you interest on such advance at the rate of £2 per cent. above the bank rate of the day or days when such cash ought to be provided, from the time of such advance until the repayment thereof, and for your security and indemnity we herewith deposit with you the securities or documents mentioned at the foot hereof, and do agree that in default of payment at any time of any money hereby engaged by us to be paid or provided, or of any money at any time owing from us to you, we hereby empower you to take and to hold and retain the said securities or documents, and the property represented thereby, or comprised or described therein, for or towards your reimbursement of any money owing by us to you, and to realize or dispose of the same in any way you may think fit without further notice. And for the further securing you against cash advance or loss under the above-mentioned credit, and all other moneys which may be or become owing by us to you, we engage at our own cost to execute at any time or times you require, legal mortgages or transfers to you or your nominee of the same securities and property."

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(1) 19 Ves. 345.

The schedule annexed to this memorandum comprised the securities in respect of the proceeds of which the present application was made.

Subsequently, in February, 1866, the corporation, at the request of *Levi & Co.*, granted to Messrs. *S. F. White & Co.* a credit of £12,000, upon the terms expressed in a memorandum of the 14th of February, 1866, of which the material portion is as follows:—

"In consideration of your granting to Messrs. *S. F. White & Co.*, a credit to be availed of by your acceptances at ninety days after sight, in favour of such persons as they shall nominate for that purpose, renewable from time to time for a period of nine months from this date, for a sum not exceeding £12,000 current at any one time, on the under-mentioned securities, we hereby engage to keep you out of cash advance at any time in respect of the said credit, and to furnish you with cash sufficient to meet the bills so to be accepted by you, or any renewal thereof, at least two clear days before the same shall respectively become due and payable. We also engage to pay you commission on acceptance of any bill or bills under the said credit, at the rate of £2 per cent. per annum on the amount so accepted, and on each renewal thereof. And we hereby engage that if at any time you shall be compelled to make a cash advance by reason of our default in providing funds to meet the said acceptances as they respectively arrive at maturity, we will pay you interest on such advance at the rate of £10 per cent. above the bank rate of the day or days when such cash ought to be provided, from the time of such advance until the repayment thereof; and for your security and indemnity we hereby charge the property, real and personal, moveable or immoveable mentioned in the schedule hereunder written, with the payment of all moneys, claims, and demands, which at any time or times hereafter may be or become due from, or payable by, the said firm of *S. F. White & Co.*, to the said bank under and by virtue of the said credit." . . . .

No question was now raised as to the property mentioned in the schedule to this memorandum.

Under the credit of the 29th of November, 1865, certain bills were drawn by *Levi & Co.*, and accepted by the corporation, and duly paid at maturity.

The bills, to the part payment of which the present application was directed, were three in number, for sums amounting in the whole to £3450. They were all drawn in favour of *Levi & Co.*, by *J. R. Mackenzie*, on the *New Zealand Banking Corporation*, by whom they were accepted. One bore date the 16th of December, 1865; and the other two the 16th of February, 1866. The first was accepted on the 13th of February, 1866, and the last two on the 12th of April, 1866. It was at first contended that these bills were drawn and accepted under the credit of November, 1865; but in the course of the argument it was admitted that they were drawn by *J. R. Mackenzie*, on account of *S. F. White & Co.*, and were accepted under the credit of February, 1866.

The two first-mentioned bills had been discounted with *Overend, Gurney, & Co.*: the last with the *London and Westminster Bank.*

Before the bills became payable the *New Zealand Banking Corporation* was ordered to be wound up. Subsequently *Levi & Co.* executed an assignment for the benefit of their creditors. The bills had been proved both against the corporation and the estate of *Levi & Co.* The corporation had paid a dividend of 7*s.* 4*d.* in the pound, and had made arrangement for paying a further dividend of 6*s.*, in equal instalments, by promissory notes payable at six, twelve, and eighteen months. To this arrangement the official liquidators of *Overend, Gurney, & Co.* had assented, reserving all their rights against *Levi & Co.*, but they now joined in the above-mentioned application. The *London and Westminster Bank* refused to join in the application, and they were not made Respondents.

The securities deposited under the credit of November, 1865, had been sold in the course of the winding up of the corporation, and produced the above-mentioned sum of £2,801 14*s.* 2*d.*

It was sworn that *Levi & Co.* were under no liability to the corporation, except under the bills in question.

Mr. *J. H. Palmer,* Q.C., and Mr. *Everitt,* for the applicants:—

The only liability of *Levi & Co.'s* estate to the corporation is in respect of these bills; therefore the holders of the bills, or, at all events, the trustees of *Levi & Co.'s* estate, are entitled to insist that the securities should be applied in reduction of that liability, on the principles laid down in *Ex parte Waring* (1) and *Powles* v. *Hargreaves* (2). The difficulty raised in *Hickie & Co.'s Case* (3) does not occur here; for if the corporation be insolvent, the holders of the bills have a right to insist on such an application of the fund; if it be not insolvent, the trustees of *Levi & Co.* have the right. [They referred to *Loder's Case* (4).]

Mr. *Jessel,* Q.C., and Mr. *Wickens* for the liquidator of the corporation:—

The bill holders have not taken any assignment of the securities, therefore their claim must rest entirely on the doctrine of *Ex parte Waring.* But that case does not apply; for the securities are not held by us to meet the bills, but to indemnify ourselves against any payments we may be called on to make in respect of them: *Ex parte Stephens* (5). The contract is that *Levi & Co.* shall meet the bills themselves; if they do not, we are to reimburse ourselves out of the securities. To such a contract as that *Ex parte Waring* does not apply; and the claim of the bill holders fails altogether.

Nor can the trustees of *Levi & Co.* succeed; they stand in the place of *Levi & Co.,* just as assignees in bankruptcy would. Now the memorandum under which the securities were deposited is a general banking security; and under it we are entitled to hold the securities against any advances we may make. We have already, by the default of *Levi & Co.*, in paying these bills, been compelled to pay a dividend on them; we may have to pay a further dividend; and upon what principle are we to be deprived of the benefit of the security we have taken?

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(1) 19 Ves. 345.
(2) 3 D. M. & G. 430.
(3) Law Rep. 4 Eq. 226.
(4) Ibid. 6 Eq. 491.
(5) Law Rep. 3 Ch. 753.

17 Jan 1083

After taking out of the fund the amount of the dividend we have already paid, there will remain about £1000; and the amount still due on the bills is about £2000. Assume that *Levi & Co.'s* estate will pay 10*s.* in the pound, *i.e.*, one-half of what still remains due; if the fund is left in our hands we shall apply it in paying the other half, and thus we shall escape all liability. But if the fund is applied now in part payment of the bills, £1000 will remain due; and we shall have to pay half of that, or £500, out of our own estate. Thus we shall be much worse off.

In truth, the bill holders will get paid out of one estate or the other; the only question is, therefore, as between a mortgagor and mortgagee, as to how the security is to be applied; and we submit that it must be applied according to the terms of the contract entered into.

Mr. *Everitt*, in reply:—

We are quite willing to allow the corporation to repay themselves out of the fund the dividend they have already paid on the bills; but beyond that they have no right to go. The security is to keep them out of cash advances; the only advance they have made is payment of that dividend. They are not entitled to hold the fund, and postpone payment of the bills, taking the chance that the course of events will turn out in their favour. The case is that of a surety, who has realized a security taken by him, and insists on keeping the money in his own pocket, neither paying the creditors nor relieving his principal. That he cannot do; he must pay the creditor, whatever inconvenience it may cause him.

March 24. Lord Romilly, M.R., stated the facts, observing that the securities were not deposited to provide for the payment of the bills now in question, but of other bills (all of which had been paid), and of what should be owing on a general account, and

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1869
Levi & Co.'s Case.

that the money due on the bills now in question fell under the latter description. The case of *Ex parte Waring* (1) had no application: the trustees of *Levi & Co.* had no right to call on the corporation to apply the securities in payment of these bills: on the contrary, the corporation were entitled to hold them as security for any balance which might be due from *Levi & Co.* The summons therefore entirely failed, and must be dismissed with costs.

Solicitors: Messrs. *Torr, Janeway, & Tagart;* Messrs. *Mackenzie, Trinder, & Co.*

WILDAY *v.* SANDYS.

M. R.
1869
April 22.

[illegible] 127
5 Ch D 54

Will—"Public Funds or Government Securities"—Long Annuities—Conversion.

A testator gave his residuary estate to trustees in trust to convert into money such parts thereof as should not at his decease consist in money or be invested in any of the public funds or government securities, and to invest the same in such public funds or government securities as to them should seem most advantageous, and to pay the interest, dividends, and annual proceeds of such residue to his children in equal shares for their lives, and after their deaths upon other trusts:—

Held, that long annuities, of which the testator died possessed, were within the exception from the trust for conversion, and that the tenants for life were entitled to enjoy them *in specie*.

ROBERT LINDLEY, by his will, dated the 26th of February, 1846, devised and bequeathed his residuary real and personal estate to trustees in trust to get in and convert into money such parts thereof as should not at his decease consist in money, or be invested in any of the public funds or government securities, and to invest the same, or such part thereof as should not be required for the immediate purposes of his will, in such public funds or government or real securities as to them should seem most advantageous, and from time to time to vary such securities as might to them appear discreet, and to stand possessed of such residue, and the stocks, funds, and securities in or upon which the same or any part thereof should be invested, and the interest, dividends, and annual proceeds thereof, upon trust to pay the interest, dividends,

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(1) 19 Ves. 345.

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and annual proceeds of such residue in equal shares amongst his five children for their lives, as to the shares of his daughters for their separate use, and after the deaths of his children upon other trusts.

The testator died in June, 1855. Part of his estate consisted of £412 long annuities, which the trustees sold, and invested the proceeds in real securities.

This was a suit by one of the testator's daughters for the administration of his estate, raising the question whether the long annuities ought not to have been received *in specie* by the tenants for life.

Mr. *Southgate,* Q.C., and Mr. *Round,* for the Plaintiff, and Mr. *Bathurst* for another tenant for life:—

The long annuities ought not to have been converted. They clearly come within the exception from the trust for conversion under the words "invested in any of the public funds or government securities:" *Lord* v. *Godfrey* (1); *Grant* v. *Mussett* (2); and although the trustees could not, under the trust to invest in public funds or government securities, have made an investment in long annuities, it does not follow that the testator did not use the words in the exception in their ordinary sense, so as to include long annuities: *Howard* v. *Kay* (3).

Mr. *Yate Lee,* for the Plaintiff's husband.

Sir *R. Baggallay,* Q.C., and Mr. *Sandys,* for the trustees.

Mr. *Swanston,* Q.C., and Mr. *Rotch,* for the persons entitled in remainder:—

It cannot be supposed either that the testator, in directing the trustees to invest in the public funds or government securities, meant them to have the power of investing in long annuities, or that he used the words "public funds or government securities" in two different senses in two consecutive clauses of his will. He must have intended the exception from the trust for conversion to include only such part of his property as should be already in the state of investment authorized by his will. The only gift to the tenants for life is the gift of the interest, dividends, and annual proceeds of his residuary estate, and these words are inapplicable to long annuities. The *onus probandi* is upon those who contend that the general rule as to conversion is excluded: *Sutherland* v. *Cooke* (1). In *Lord* v. *Godfrey* (2) and *Grant* v. *Mussett* (3) there were specific bequests of stocks and funds.

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(1) 4 Madd. 455.

(2) 8 W. R. 330.

(3) 27 L. J. (Ch.) 448.

LORD ROMILLY, M.R.:—

I am of opinion that under this will the long annuities were not intended to be converted. The words of the exception, if construed literally, include long annuities; it is impossible to say that the £412 long annuities are not part of the estate "invested in any of the public funds or government securities." Then the question is, whether there is anything in the rest of the will which requires that these words should not receive their literal construction. The language of the trust for investment is relied on for that purpose, and it is argued that the trustees could not have invested any part of the estate in long annuities under the trust to invest in public funds or government securities, and that therefore the long annuities could not be included under those words in the exception. But the reason why the trustees could not have invested in long annuities is not because long annuities would not come within the words of the trust for investment, but because the rule of this Court does not permit the trustees in exercising their discretion in the selection of investments to select such as are of a perishable nature. Moreover, there is a distinction between the language of the two clauses. In the exception it is "any of the public funds or government securities," but in the trust for investment it is "such public funds or government securities as to them shall seem advantageous," and the long annuities are none the less public funds or government securities because no trustee would think them an advantageous investment. I think, also, that the case is completely governed by *Howard* v. *Kay* (4), and though I do not like to construe one will by another, I cannot put a dif-

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(1) 1 Coll. 498.
(2) 4 Madd. 455.
(3) 8 W. R. 330.
(4) 27 L. J. (Ch.) 448.

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ferent construction upon the words of this will from that which was put upon the very same words in that case. I must therefore hold that the tenants for life were entitled to enjoy these long annuities *in specie*.

Solicitors: Mr. *W. M. Webster*; Messrs. *Sandys & Knott*.

M. R.
1869
April 26.

9 Eq 391

LLOYD *v.* LLOYD.

Will—Construction—General Gift of Property—Real Estate.

A specific devise of real estate was followed by a devise and bequest of all the testator's other property whatsoever and wheresoever to trustees upon trusts which were expressed in terms more appropriate to personalty than to realty. The testator was not, at the date of his will, entitled to any real estate other than that specifically devised, but he subsequently became entitled to real estate of great value:—

Held, that such subsequently acquired real estate passed by the will.

Coard v. *Holderness* (1) distinguished.

EDWARD LLOYD, by his will, dated the 1st of January, 1863, devised to his wife, *Rosabelle Susan Lloyd*, his house and lands at *Lingcroft*, in the parish of *Naburn*, in the county of *York*, for her life, and at her decease to his eldest daughter, *Georgina Rosabelle Lloyd*, her heirs and assigns, or, in the event of her dying before her mother without issue, to his second daughter, *Edith Maria Græme Lloyd*, her heirs and assigns for ever. And the testator, after bequeathing to his said wife the use of the whole of any furniture, plate, books, trinkets, and other articles in or about his house during her life, and at her decease bequeathing the same to his said two daughters, or the survivor of them who should be then living, and bequeathing to his wife such of his horses, carriages, and saddlery as she might think suitable, and all consumable articles in and about his house, continued as follows:—

"I devise and bequeath all my other property whatsoever and wheresoever to my brother the Reverend *Yarburgh Gamaliel Lloyd* and my nephew *Yarburgh George Lloyd*, upon trust to continue the same in the investments on which it shall be standing at the time of my decease, or, at their discretion, to call in the same, and invest it in their names on government or real securities, or debentures of railways or municipal corporations, and to apply the same in manner following:—To set apart such a portion of the said residue as, with the sum of £300 a year settled on my said wife, will amount to one-half of the total income arising from my residuary estate and the said settled property united, and to pay the interest of such sum to her during her natural life; and I bequeath the income of the remainder of my said residuary estate to my said two daughters, whom I commit to the care of their mother as their sole guardian. And I direct that my trustees shall pay to my said wife, and after her decease shall apply for their maintenance and education such part of their income as they shall think proper until they attain respectively the age of twenty-one years, or marry with their mother's consent, and that, on their respectively attaining that age, or marrying as aforesaid, the said remaining trust fund shall be equally divided between them, and the sum reserved as aforesaid for their mother's life shall be divided in the same manner at her decease. Should I leave any other children, they shall take equal shares with their sisters in the furniture and property bequeathed to them."

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(1) 20 Beav. 147. 1 Jur N.S. 317

The testator died in February, 1869, leaving his wife and three daughters surviving him. At the date of his will the testator was possessed of no other real estate than that specifically devised, but at the time of his death he was entitled to freehold lands and hereditaments of great value, and the question was whether such real estate passed under the residuary gift above set forth, or devolved on the three daughters of the testator as his co-heiresses-at-law.

Sir *R. Baggallay*, Q.C., and Mr. *W. Brodrick*, for the daughters:—

The residuary real estate of the testator does not pass by the will. The testator makes use of no words of limitation in the residuary gift, although he does in specifically devising real estate in the earlier part of his will. The expressions "continue in the investments in which it shall be standing," "call in," "income," "remaining trust fund," are all inapplicable to real estate, although applicable to personal estate. Either, therefore, the real estate

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does not pass to the trustees at all, or, if it does, no trusts are declared of it, and there is an intestacy as to the beneficial interest: *Coard* v. *Holderness* (1); *Doe* v. *Buckner* (2); *Dunnage* v. *White* (3).

Mr. *Jessel*, Q.C., and Mr. *Babington*, for the widow of the testator, and the trustees of the will:—

Coard v. *Holderness*, if it be sound law, goes to the very extreme limit, but a decision that this will does not pass real estate would go beyond it. Here is a specific devise followed by a devise and bequest of all the testator's other property whatsoever and wheresoever; that must pass the real estate. It does not signify that the trusts are expressed in language more appropriate to personalty than to realty: *Stokes* v. *Salomons* (4); *Saumarez* v. *Saumarez* (5). It may be questionable whether the trustees have power to sell the real estate, but it is to be borne in mind that land is as much an investment as stock.

Sir *R. Baggallay*, in reply.

Lord Romilly, M.R.:—

I think the will includes all the real estate. The testator first gives some real estate; then he devises and bequeaths all his other property whatsoever and wheresoever to trustees. It is true he does not use the words "heirs and assigns," but neither does he use the words "executors and administrators," which were relied on in *Coard* v. *Holderness*; and not only that, but he speaks of the income of his residuary estate. I think, therefore, there is no intestacy.

Solicitors: Messrs. *Bell, Brodrick, & Gray*, agents for Mr. *William Gray, York.*

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(1) 20 Beav. 147. 1 Jur. N.S. 317
(2) 6 T. R. 610.
(3) 1 Jac. & W. 583.
(4) 9 Hare, 75.
(5) 4 My. & Cr. 331.

JODRELL v. JODRELL.

M. R.
1869
April 17, 19.

6 Ch D 141

Settled Estate—Timber—Tenant for Life and Remainderman—Apportionment—4 & 5 Will. 4, c. 22.

By a will which came into operation subsequently to the passing of the Apportionment Act, 4 & 5 Will. 4, c. 22, real estate was devised to *A.* for life subject to impeachment for waste, with remainder to *B.* for life without impeachment for waste, with remainders over. With the sanction of the Court timber on the estate was cut down and sold, and the proceeds of sale invested; and the dividends were ordered to be paid to *A.* during his life:—

Held, that the whole of a dividend which accrued due shortly after the death of *A.* was payable to *B.*, and could not be apportioned between him and the representatives of *A.*

JOHN WILLIAM JODRELL, by his will, dated the 22nd of May, 1858, devised certain real estates in *Cheshire* and *Derbyshire* to *Francis Charles Jodrell* for life subject to impeachment for waste, with remainder to *Edmund Henry Jodrell* for life without impeachment for waste, with remainder to *Thomas Jodrell Phillips Jodrell* for life, also without impeachment for waste, with remainders over. The testator died on the 25th of May, 1858.

Upon the estates in question were woods and plantations of great extent and value; and this suit was instituted by *Francis Charles Jodrell* for the purpose of obtaining the sanction of the Court to the felling of the timber. Under the direction of the Court a considerable quantity of timber was cut down and sold, and the proceeds of sale invested; and the income arising from such investments was ordered to be paid to *Francis Charles Jodrell* during his life.

Francis Charles Jodrell survived *Edmund Henry Jodrell*, and died on the 4th of June, 1868; and thereupon *Thomas Jodrell Phillips Jodrell* became tenant for life of the estates without impeachment of waste.

On the 5th of July, 1868, a dividend accrued due on the investment of the proceeds of sale of the timber.

A Petition was now presented by *Thomas Jodrell Phillips Jodrell* for payment to him of the *corpus* of the timber fund, the dividend which accrued thereon on the 5th of July, 1868, and a subsequently accrued dividend, after deducting the costs of the application, and the succession duty payable in respect thereof.

Mr. *Rigby*, for the Petitioner:—

It is quite clear that the Petitioner, being the first tenant for life without impeachment of waste who has come into possession, is entitled to the *corpus* of the fund: *Gent* v. *Harrison* (1).

Further, the dividend which accrued on the 5th of July, 1868, ought not to be apportioned. In *Cattley* v. *Arnold* (2) it was held that where estates devised by a will coming into operation since the Apportionment Act, 4 & 5 Will. 4, c. 22, had been demised by parol, there could be no apportionment of the rents between the tenant for life and remainderman, because the rents were not reserved by an instrument in writing. Here the dividends have been paid to the tenant for life under an order of Court; but the order is not an instrument within the meaning of the Act, which speaks of instruments "executed" by some one: *In re Longworth's Estate* (3); *In re Lawton Estates* (4).

Mr. *Dryden*, for the representatives of *Francis Charles Jodrell*:—

I admit that the authorities are conclusive to shew that the Petitioner is entitled to the *corpus* of the fund; but I contend that the July, 1868, dividend ought to be apportioned. The cases of *In re Longworth's Estate* and *In re Lawton Estates* were decided on instruments which came into operation before the passing of the Apportionment Act. *Cattley* v. *Arnold* had reference to rents, and does not govern the present case. Here, by a will dated subsequently to the Apportionment Act, real estate has been devised to several persons successively for their lives; this dividend, representing timber, is a fruit of the land, and ought to be apportioned. If the argument on the other side be sound, dividends and moduses are out of the Act altogether.

[He referred to *Knight* v. *Boughton* (5)].

Mr. *Rigby*, in reply:—

Cattley v. *Arnold* shews that it is not sufficient that the will should be dated subsequently to the Apportionment Act. If that had been enough, the tenant for life would have been entitled to have the rents apportioned, but the contrary was decided. In fact, the dividends are periodical payments, payable not under the will, but under the order of Court; and the cases of *In re Longworth's Estate* (1) and *In re Lawton Estates* (2) are express that the Apportionment Act does not apply to payments under an order of Court.

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(1) Joh. 517. 5 Jur. N.S. 1285
(2) 1 J. & H. 651. 5 Jur. N.S. 361.
(3) 1 K. & J. 1.
(4) Law Rep. 3 Eq. 469.
(5) 12 Beav. 312.

April 19. LORD ROMILLY, M.R.:—

I have looked at the authorities, and I think that they establish that there is no apportionment in this case. An order of Court is not an instrument within the meaning of the Act: and upon the authorities there can be no apportionment. In fact, the Act does not provide for many cases which it was apparently intended to meet.

Solicitors: Messrs. *J. & C. Cole.*

In re PEYTON'S SETTLEMENT TRUST.

M. R.
1869
April 24.

Trustee—Power to invest in Land—Freehold Ground Rents.

Trustees having power to invest money in the purchase of lands or hereditaments in fee simple in possession, may invest in the purchase of freehold ground rents.

BY a settlement made on the 4th of April, 1843, in contemplation of the marriage of *Joseph John Wakehurst Peyton* and *Marianne Gilberta*, his wife, certain freehold estates in the county of *Sussex* to which *J. J. W. Peyton* was entitled were settled; and the trustees were empowered to sell the same, and were required to invest the money to arise from such sale " in the purchase of other manors, lands, or hereditaments, to be situate in *England* or *Wales*, of a clear and indefeasible estate of inheritance in fee simple in possession," or in lands of a leasehold or copyhold tenure, convenient to be held

(1) 1 K. & J. 1. (2) Law Rep. 3 Eq. 469.

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1869
In re
PEYTON'S
SETTLEMENT
TRUST.

therewith; and by the same settlement *J. J. W. Peyton* covenanted to surrender certain copyhold hereditaments to the trustees, to be held by them upon the like trusts with those declared of the freeholds.

In June, 1868, a portion of the freehold hereditaments in *Sussex* was sold; and the trustees were desirous to invest £8866, part of the moneys arising from the sale, in the purchase of several plots of land in the parish of *Kensington,* on which fifty-five dwelling-houses had been recently erected, and of which leases had been granted for terms of ninety-nine years, at rents amounting in the whole to £403. Doubts having been expressed whether the purchase of land on which houses had been erected, and of which leases reserving ground rents had been granted for long terms of years, would be a purchase of "hereditaments in fee simple in possession," the trustees presented a Petition under *Lord St. Leonards' Act,* desiring the opinion of the Court whether the investment of a portion of the moneys arising from the sale of the said hereditaments in the purchase of freehold ground rents was an investment within the terms of and authorized by the settlement.

Mr. *Jessel,* Q.C., and Mr. *E. S. Ford,* for the Petition.

The MASTER OF THE ROLLS said he had no doubt that the investment was authorized by the settlement.

Solicitors: Messrs. *Budd & Son.*

M. R.
1869
April 19.

7 Ch 49
WN (75) 171

HORSLEY *v.* COX.

Costs—Taxation—Three Counsel.

The costs of a third counsel allowed where the junior counsel who had drawn the answer and conducted the cause was called within the Bar before the hearing.

THIS was a summons to review the taxation of a bill of costs. The Taxing Master had disallowed three counsel to the Defendant, against whom the bill had been dismissed with costs. The Defendant had retained a leading counsel, and employed a junior counsel

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HORSLEY
v.
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to draw his answer, and to examine certain witnesses. Before the hearing he was called within the Bar. At the hearing a brief was given to him, as well as to the leading counsel previously retained, and a new junior counsel.

Mr. *Southgate*, Q.C., and Mr. *Edmund James*, for the Defendant, were not called upon.

Mr. *Locock Webb*, for the Plaintiff:—

These costs were allowed in *Carter* v. *Barnard* (1); but that case was not followed in *Green* v. *Briggs* (2). The true rule was laid down by the present Lord Chancellor in *Midland Railway Company* v. *Brown* (3), "that a party could not put his adversary to an expense which was not really necessary in the conduct of the cause." Here there was nothing in the nature of the cause to render it necessary that three counsel should be employed.

Mr. *Southgate* referred to *Betts* v. *Clifford* (4).

LORD ROMILLY, M.R.:—

I think the third counsel ought to be allowed. If the Defendant had not given a brief to the leading counsel whom he had previously retained, he would have lost his retainer; he must have a junior; and as to his former junior who had been called within the Bar, if he had not given him a brief, he might have been engaged on the other side, on account of his intimate knowledge of the case, and thus inflict a severe injury on his former client—an injury which, as regards solicitors, Lord *Eldon*, in the case of *Cholmondeley* v. *Clinton* (5), granted an injunction to prevent.

Solicitors: Mr. *A. S. Lawson*; Mr. *T. W. Flavell*.

(1) 16 Sim. 157.
(2) 7 Hare, 279.
(3) 10 Hare, App. xliv.
(4) 1 J. & H. 74, 78.
(5) 19 Ves. 261.

17 Jan 970

V.-C. S.

1869

Feb. 25.

COOK *v.* ADDISON.

Lessor, Trustee, and Mortgagee—Default by Mortgagor—Re-entry of Lessor, destruction of Trust Property by—Mixing of Trust Property with Trustee's own.

3 Ch. D. 260.

A., who was one of the trustees under a settlement, demised a house of which he was lessee to *S.*, who covenanted to repair. *S.* afterwards, out of a loan, made with the consent of the *cestui que trust*, of a part of the trust funds, purchased from *A.* the furniture in the house, and executed a mortgage of the underlease, and a bill of sale of the furniture, to the trustees. *S.* having made default in payment of principal and interest, *A.* re-entered, and subsequently assigned, for a premium and for an annual rent, the residue of the term vested in him of the house to *F.*, who purchased the furniture, and also paid a sum towards the repairs. *A.* invested a sum to make good the principal trust fund, but refused to pay the interest which had accrued due from *S.*:—

Held, that *A.* had, by his conduct, mixed the trust funds; and that the interest must be paid out of the sum received by him from *F.* for repairs.

IN the month of October, 1864, the Plaintiff, at that time the widow of a Mr. *Newton*, intermarried with the Defendant *Henry Cook*. The Defendants *Addison* and *Tatham* were the trustees of the settlement made on the marriage, and to them certain funds were assigned upon trust during the joint lives of the Plaintiff and her husband to pay the income to the Plaintiff for her sole and separate use, but without any power of anticipation. In case the Plaintiff should survive her husband, the trustees were to pay unto, or permit her to receive, the income. It was declared that it should be lawful for the trustees, with the consent of the Plaintiff, during her life to transfer the funds vested in them, and to invest the moneys in the manner in the indenture mentioned, and, amongst other securities, upon the personal security of any person.

The Defendant *Addison* was, early in the year 1865, the lessee of No. 36, *Cavendish Square*, for the residue of a term of twenty-one years; and he, by an indenture of underlease dated the 20th of March, 1865, demised the same premises for a term of nine and a quarter years, wanting ten days, to two ladies named *Strutton*, at a rent of £310, payable quarterly. The indenture contained a power of re-entry on non-payment of the rent reserved for twenty-one days, or on breach of any of the covenants (amongst which was one to repair the premises) on the part of the lessee.

The Misses *Strutton* being desirous of purchasing the furniture in the said house from the Defendant *Addison*, from whom they had hired it, paying an annual rent, a sum of £520 was advanced to them by the trustees out of the trust estate, on the security of a bill of sale of the furniture and a mortgage of the underlease. The Plaintiff consented to the loan, having been informed by *Addison* that the furniture was worth £700. This arrangement was carried out by two indentures, dated the 30th of April, 1865. By one of them it was declared that if, after notice in writing to pay off the moneys owing, default should be made in payment of them, or some part thereof, for one month, it should be lawful for the trustees, without any further consent on the part of the Misses *Strutton*, to sell the furniture, and by the other the premises comprised in the underlease for the residue of the term, except the last day, were assigned to the trustees, and the indenture contained the usual covenant for re-entry if default should be made in payment of the £520, or any interest, or any part thereof, on the day appointed. The Defendant *Addison* was paid £500 as the purchase-money of the furniture. In March, 1867, the Misses *Strutton*, being in pecuniary difficulties, left and abandoned possession of the house; and in April, 1867, the Defendant *Addison*, under the power contained in the indenture of underlease of the 20th of March, 1865 (there being two quarters' rent due), re-entered on the premises and determined the underlease. Subsequently, the Defendant *Addison* assigned the entire residue of the term of the premises vested in him to a Mr. *Fowler*, at a rent of £310, and on payment of a premium of £100. *Fowler* also purchased the furniture for £550, and paid £250 towards the repairs. The Defendant *Addison* received sums making together £900. Out of the sum of £900 the Defendant *Addison* at first claimed to be paid sums for rent, and repairs, and expenses, which left a balance of £332 towards the discharge of the £520 and arrears of interest. The Plaintiff having refused to accept that sum, the Defendant *Addison* next informed her solicitor that the trustees had invested £475 12*s.* 6*d.*, as the entire amount realized, after deducting sums for expenses, for her benefit, but that sum having also been refused,

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the deficiency was made good by the Defendant *Addison*, and the full sum of £520 was invested in £3 per cent. consols. The Defendant *Tatham*, on the 8th of April, 1867, wrote to the solicitors of the Plaintiff, stating that it was necessary that they (the trustees) should proceed to a sale of the furniture, &c., secured by the bill of sale; that having regard to Captain *Addison's* position as trustee and assignee under the bill of sale, and also as mortgagee of the underlease which he had granted, he could not legally claim the arrears of rent as against the *cestui que trust.* The Defendant *Addison* having refused to make good the amount which the Plaintiff claimed as being due for interest on the £520 from the 30th of April, 1865, to the 12th of August, 1867, the date of investment in the funds, and on £44 7*s.* 6*d.*, the difference between the sum of £475 12*s.* 6*d.* so invested, and the sum of £520 to the date of investment thereof, she, by her bill filed in January, 1868, prayed that the trusts of the settlement might, as far as necessary, be carried into execution; that the amount payable by the Defendants, the trustees, or either of them, to the Plaintiff in respect of interest might be ascertained, and the same Defendants might be decreed to make good and pay such sum.

The Plaintiff also asked for the appointment of new trustees, and for the payment of costs by the old trustees or one of them.

The answer of the Defendant *Tatham* stated that the Plaintiff gave instructions that the settlement should contain powers for her trustees to lend the trust funds upon personal as well as other securities, as it was her wish that a sum of £500 should be lent by her trustees after her marriage to some friends of hers; and that the persons so referred to were the Misses *Strutton*, the Plaintiff having, while a widow, resided in their house. Both the trustees submitted, by their answers, whether, under the circumstances, they ought to account to the Plaintiff for the interest claimed by her.

Mr. *Karslake*, Q.C., and Mr. *C. Hall*, for the Plaintiff:—

The trustees, as mortgagees, ought to have exercised their power of sale; but instead of doing that, the Defendant *Addison*, being the immediate owner of the reversion, exercised his right of reentry, and he thereby destroyed the property specifically comprised in the mortgage to the trustees; consequently, the interest due, and which was just as much secured by the mortgage deed as the principal sum, ought to be paid by the trustees, or by one of them —the Defendant *Addison*, who has occasioned this suit by refusing to pay it, and who has mixed the proceeds of the trust property with his own. The consent which the Plaintiff gave to the loan did not destroy, by any acquiescence on her part, her right to claim the interest due. [They were stopped by the Court.]

Mr. *Dickinson*, Q.C., and Mr. *Daly*, for the Defendant *Addison*:—

The loan to the Misses *Strutton* ought, in strictness, to be considered that of the Plaintiff and her husband, for the Plaintiff communicated to *Addison* the fact that she had arranged to make the loan, and both she and her husband formally consented to the loan. There can be no doubt that the Plaintiff knew the security upon which the money was lent. She also knew that the interest was not paid by the Misses *Strutton*, and yet she did not insist upon or demand the payment of it, and therefore she was bound by acquiescence. The demand of the Plaintiff against the trustees —or against the Defendant *Addison* only—personally for the interest which was lost through her not calling for its payment cannot be supported. The Plaintiff knew that the furniture and underlease were liable to the landlord, the Defendant *Addison*; and it must be considered that she directed her trustees to advance her money, which she also knew would be liable to be diminished by claims paramount to her own. The Defendant *Addison* might have distrained for the rent which accrued due, but which was never paid, and that would have diminished the security. The claim now made was not only a most improper, but an ungracious one, and the bill ought to be dismissed, as it was in the case of *Brewer* v. *Swirles* (1), and with costs.

Mr. *Wickens*, for the Defendant *Tatham*, submitted that he had been no actor in the matter which created the mixture of the trust fund with the Defendant *Addison*'s, and that he ought to be paid his costs by the Plaintiff, or out of the trust funds.

Mr. *Hanson*, for the Defendant *Cook*, asked for his costs from the trustees, or one of them.

(1) 2 Sm. & Giff. 219. 16 Jan 1069.

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Sir John Stuart, V.C.:—

The trustees, with the consent of the tenant for life, who is *cestui que trust,* invested £520 of the trust money on a mortgage. The mortgage security was an underlease of a house and a bill of sale of furniture in the house.

By the form of the mortgage security the mortgagors were subject to covenants to repair, and the trustees, as mortgagees, had a right to enforce the covenant to repair against the mortgagors. It happens that one of the trustees was owner of the reversion of the house comprised in the underlease, and the underlessees—mortgagors—were liable to him on a covenant to repair. The question occurs on the realization of the security. Being owner of the reversion in his own right, and exercising his right, he, by his entry, destroyed the underlease vested in him as trustee by way of mortgage. This seems to have been done with no bad intention; but the effect has been to confound the trust estate with his own private property in the reversion. His strict duty was to join in the first instance with his co-trustee in selling the house and furniture together. Any suggestion that he might have been unable to do that with advantage, on account of the rights of the superior landlord under whom he held, would not be a sufficient reason for not doing so, and for the course which he pursued in determining the lease. His co-trustee, as appears from the letter set out in the bill, did not concur in his proceedings, but considered that the trustees ought to proceed to a sale of the furniture.

It is a well-established doctrine in this Court, that if a trustee or agent mixes and confuses the property which he holds in a fiduciary character with his own property, so as that they cannot be separated with perfect accuracy, he is liable for the whole. This doctrine was explained by Lord *Eldon* in *Lupton* v. *White* (1).

In this case it is impossible to say how much of the £250 received by the Defendant *Addison* from *Fowler* for repairs consisted of what was due under the covenant to repair in the underlease. The consequence is, that the whole £250 is liable to the demands of the *cestui que trust* so far as necessary to make up, with the other sums admitted to be part of the trust property, the full amount of the trust fund of £520, with interest at 5 per cent. per annum from the

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(1) 15 Ves. 432.

30th of April, 1865, and there must be a declaration to that effect, and an order against the Defendant *Addison* to pay that amount, and he must pay the Plaintiff's costs of the suit. The Plaintiff must pay the Defendant *Tatham's* costs as between party and party, and recover them over from *Addison*, and *Tatham's* costs, as between solicitor and client, must come out of the trust funds. There will be no order as to the Defendant *Cook's* costs.

Solicitors: Messrs. *Paterson, Snow, & Burney*, agents for Mr. *Thomas Mingaye Golding, Walsham-le-Willows, Suffolk;* Messrs. *Davies, Son, Campbell, & Reeves;* Messrs. *Pownall, Son, Cross, & Knott.*

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1869
Feb. 25.

BRYDEN *v.* WILLETT.

Construction of Will—"Issue" restricted to "Children"—"Leaving Issue," read "Having had Issue."

10 Eq 367-9
10 QB 460-1
4 ChD 184
11 ChD 882
12 ChD 753
8 QBD 576

A testator gave the residue of his estate to trustees to invest and pay one-fourth of the income to each of his four sisters for life, and when and so soon as any of them should die "without leaving issue," then he directed that the share in the trust moneys of her or them so dying "without issue" should be divisible among his surviving sisters, and the issue of any who might then be dead, in equal shares, but such issue to take only their respective "parent's" share; and when and so soon as any of his sisters should die and "leave issue," then upon trust to call in the share of her or them so dying "leaving issue," and pay the same unto such respective issue, if more than one "child," equally:—

Held, that "issue" here meant "children," and that "leaving issue" meant "having had issue."

One of the testator's sisters died, having had two children, one of whom survived her mother, and the other died in her mother's lifetime, leaving a family:—

Held, that a moiety of her mother's share vested in the daughter who died in her lifetime, and consequently passed to her family.

Sheffield v. *Kennett* (1) observed upon.

WILLIAM OWEN STONE, by his will, dated the 17th of December, 1838, devised and bequeathed his residuary real and personal estate to trustees upon trust for sale, and to pay an equal fifth part of the moneys arising from such sale to his sister, *Maria Ann Stone*, and to invest the remaining four-fifths, and pay one equal fourth part of the dividends to each of his four married sisters therein named, for their respective lives for their separate use. The testator then continued as follows: "And when and so soon as either or any of my said married sisters shall depart this life without leaving issue, then I direct that the part or share or parts or shares in the said trust moneys of her or them so dying without issue shall be divisible among all the survivors or survivor of my said sisters (including my said sister *Maria Ann Stone*, whose share shall be immediately paid to her for her absolute use and benefit), and the issue of any who may then be dead, in equal parts or shares, but such issue to take only their respective parent's

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(1) 27 Beav. 207; 4 De G. & J. 593.

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share therein. . . . And when and so soon as either or any of my said married sisters shall depart this life and leave issue, then upon trust that my said trustees do and shall call in the original and accruing share or shares in the said moneys of her or them so dying leaving issue, and pay the same unto such respective issue, if more than one child, equally to be divided between them for their respective absolute benefit."

The testator died on the 28th of September, 1839, leaving his five sisters named in his will surviving. One of the married sisters, *Elizabeth Johnson*, died on the 29th of April, 1867, having had two children, *Isabella Owen Bryden*, the Plaintiff in the present suit, who married in her mother's lifetime and had children, and *Anna Maria Johnson*, who married *George Bell Irving*, and died on the 19th of October, 1852, that is, in her mother's lifetime, leaving three children, who were Defendants in the suit.

The question in the suit—which was for the administration of Mrs. *Johnson's* share under the will—was whether Mrs. *Bryden*, who survived her mother, was entitled to the whole of her mother's share, or to a moiety only, the other moiety to go to the children of her sister, Mrs. *Irving*, who died in her mother's lifetime.

Mr. *Pearson*, Q.C., and Mr. *Currey*, for the Plaintiff, Mrs. *Bryden* :—

The direction in the will being that the issue shall take their parent's share, the word "issue" should be construed in the restricted sense of "children:" *Pruen* v. *Osborne* (1). And the testator by using the words "such respective issue, if more than one child," interprets his own language, and evidently intended that the word "issue" should be taken as synonymous with "child" or "children:" *Ryan* v. *Cowley* (2); *Farrant* v. *Nichols* (3); *Carter* v. *Bentall* (4). Upon this construction Mrs. *Irving's* family cannot be entitled to any share, since Mrs. *Johnson* did not "leave" her daughter surviving her: *Sheffield* v. *Kennett* (5).

Mr. *Wintle*, for other parties in the same interest :—

In one part of the will the testator directs that the "issue" of

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(1) 11 Sim. 132.
(2) Lloyd & Goold, 7.
(3) 9 Beav. 327.
(4) 2 Ibid. 551.
(5) 27 Beav. 207; 4 De G. & J. 593.

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any of his deceased sisters shall take their "parent's" share; hence by the reference to the parents, the word "issue" is here necessarily restricted to children: *Sibley* v. *Perry* (1); *Rhodes* v. *Rhodes* (2): *Lanphier* v. *Buck* (3); *Ross* v. *Ross* (4). And the word "issue," having this particular meaning in this part of the will, must receive the same construction throughout: *Rhodes* v. *Rhodes*; *Ridgeway* v. *Munkittrick* (5).

Mr. *Cotton*, Q.C., and Mr. *Law*, for the children of Mrs. *Irving*:—

We contend that the word "issue" may be taken in its general and ordinary sense, and that there is no inconsistency in holding that the word "parent" may not be confined to a sister of the testator, but may mean a child of such sister. This larger construction was adopted in *Ross* v. *Ross*, and is not to be cut down by the word "child," which should be considered as co-extensive with issue: *Wyth* v. *Blackman* (6); *Dalzell* v. *Welch* (7).

But if the Court should be of opinion that the word "issue" should be restricted to "children," we contend that, according to the testator's plain intention, Mrs. *Irving* took a vested interest at her birth; and the principle followed in all cases of this kind is, that where you find an intention that a child shall take a vested interest at a particular period, and words introduced which would divest the interest in the event of the parent dying without leaving the child surviving, if the interest has once vested the Court, considering that the testator has intended to make provision for the child, will struggle to maintain the vested gift rather than take it away from the issue. Upon this principle the words "leaving issue" should be construed as "having had issue;" *White* v. *Hill* (8); *Kennedy* v. *Sedgwick* (9); *Walker* v. *Simpson* (10); *Ex parte Hooper* (11); *Marshall* v. *Hill* (12); *Martin* v. *Holgate* (13).

Mr. *Pearson*, in reply, referred to *Smith* v. *Horsfall* (14).

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(1) 7 Ves. 522.
(2) 27 Beav. 413.
(3) 2 Dr. & Sm. 484, 492.
(4) 20 Beav. 645.
(5) 1 Dr. & W. 84.
(6) 1 Ves. Sen. 197.
(7) 2 Sim. 319.
(8) Law Rep. 4 Eq. 265.
(9) 3 K. & J. 540.
(10) 1 Ibid. 713.
(11) 1 Drew. 264/ 1 Jur. N.S. 675.
(12) 2 M. & S. 608.
(13) Law Rep. 1 H. L. 175.
(14) 25 Beav. 628.

(3) S.C. 11 Jur. N.S. 837

SIR R. MALINS, V.C.:—

The point I have now to decide is, whether Mrs. *Bryden*, the only child of Mrs. *Johnson* who survived her, takes the whole of her mother's share, or whether it is to be divided into two shares between Mrs. *Bryden* who survived her mother, and Mrs. *Irving*, who died in her mother's lifetime, leaving a family. Now if the words of this will oblige me to come to the conclusion that the daughter who married in her mother's lifetime and had a family is to take the whole of this property to the exclusion of her sister who did precisely the same, that is, married and had a family, but happened to die in her mother's lifetime, it is about as gross an injustice, and, in my opinion, as gross a violation of the plain intention of this testator, as could well be; because I am satisfied that his intention was to give the property to each of his sisters for life, with remainder to their children; and it was only in the event of their dying without children that he intended the property to go over, and he did not intend to attach any importance to the circumstance of the children surviving the parent. Still I must take the words as I find them.

It is not questioned that, as a general rule, where there is a gift for life with remainder to the issue of the tenant for life, the word "issue" will comprehend issue to the remotest generation, unless there be something to restrict or qualify the words of the gift. But in this case the testator has interpreted his own language, and shewn that by "issue" he means "children," or issue only of the first generation, for he says the share is to go to the "issue if more than one child." The same interpretation was adopted in *Carter* v. *Bentall* (1), and in the numerous authorities there cited, and it is according to the plain rule of common sense. Therefore I am opinion that the objects of this gift are issue not more remote than children.

There is nothing more firmly settled, I apprehend, than that where there is a gift to a parent for life, with remainder to the children in such a form as will give vested interests to the children, either at their birth or at a particular age, and that gift is followed by a limitation over if the parent shall die without "leaving" children, the word "leaving" there means "having," or "having had." That interpretation was settled so long ago as in *Maitland* v. *Chalie* (1), and was adopted in *Ex parte Hooper* (2), by Sir *James Parker* in the remarkable case of *In re Thompson's Trust* (3), in *Kennedy* v. *Sedgwick* (4), in *Marshall* v. *Hill* (5), and lastly in *White* v. *Hill* (6). In the latter case there was a gift to the parent for life with remainder to the children, and if the parent should die without leaving children then a gift over; there the Vice-Chancellor, the present Lord Chancellor, following those other cases, which are founded upon the commonest principles of justice and sense, read the words "without leaving children," as in these different cases they always have been read, namely, as meaning "without having children," or "without having had children," and therefore held that the original gift took effect, and the gift over failed. Now the difficulty in this case is, that the gift itself is introduced with the word "leaving." After the gift to the four sisters the testator proceeds, "when and so soon as either or any of my said married sisters shall depart this life without leaving issue," and so on. Now the word "leaving" in that clause must, as I have said, be read "having," or "having had," and I now come to the gift upon which the whole question turns, "and when and so soon as either or any of my said married sisters shall depart this life and leave issue, then upon trust that my said trustees do and shall call in the original and accruing share or shares in the said moneys of her or them so dying leaving issue, and pay the same unto such respective issue, if more than one child, equally to be divided between them for their respective absolute benefit." Here, following the previous interpretation, I read the words "leave issue" as "have issue," or "having had issue," the word "issue" meaning "children" according to the testator's own interpretation. The gift over should therefore be construed thus: "When any one of my sisters shall die having had children, then after her decease her share of my property, that is a fourth, and her accruing share also, shall go to her children in equal shares."

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(1) 2 Beav. 551.

The next question is, when are the children to take? There is no

(1) 6 Madd. 243.
(2) 1 Drew. 264.
(3) 5 De G. & Sm. 667. 17 Jur
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(4) 3 K. & J. 540.
(5) 2 M. & S. 608.
(6) Law Rep. 4 Eq. 265.

postponement here until marriage or attaining twenty-one; but that makes no difference, as the present Lord Chancellor points out in *White* v. *Hill* (1), in his observations on *Bythesea* v. *Bythesea* (2), in which cases the same thing took place, namely, there was no postponement of vesting, and he held that every child took a vested interest at the moment of its birth. There is no impropriety in that, because the property is thus kept in the particular family, and greater justice upon the whole is done by holding that the property should go to the family, according to the testator's obvious intention, than by taking it wholly away from them, because the testator has inadvertently used the word "leaving" when he means "having," or "having had." Now this appears to me to be so plain that I should have no hesitation whatever, if it had not been for the case of *Sheffield* v. *Kennett* (3); to my mind that is about one of the most unsatisfactory cases I have ever met with, because, as reported, it is a case in which the decision stands without any reasons whatever being given, when strong reasons were manifestly required to support it. [His Honour, after reading the case as reported, continued:—] That case is, as I have said, wholly unsatisfactory to my mind. If it were like this case I should be bound to follow it, as it was decided by the Court of Appeal; but I think it is wholly dissimilar to this case—at all events, if I am wrong I can be set right. I intend in this case to put what I think is a rational interpretation upon the word "leave," and to treat it as settled accordingly by the numerous authorities that have been referred to, that in all cases where there has been a gift which will vest, and a gift over upon the parent dying without "leaving" issue, the word "leaving" is to be read as "having," or "having had;" if it were read in any other sense it would do manifest injustice, because it would exclude some of the objects of the testator's bounty, and my opinion is that, whether the word "leave" is in the introductory clause of the gift or in the gift over, it should equally be read in a sense that will give effect to the testator's intention. If a testator means distinctly to create a gift contingent only upon surviving the parent, he can very easily do so by saying, for instance, "I

(1) Law Rep. 4 Eq. 265.
(2) 17 Jur. 645.
(3) 27 Beav. 207; 4 De G. & J. 593.

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give to my daughter for life, and after her decease to her children living at her death." I am satisfied that in almost all cases of this kind the word "leaving" does not mean "leaving" in the primary sense, but "having." That is the interpretation so often put upon it, that I shall only be doing justice by adhering to that interpretation. In the present case the contrary would work the manifest injustice which I have pointed out, namely, that this lady, Mrs. *Johnson*, having had two children, both of whom married and had families in her lifetime, the one who happened to survive her would take the whole, to the utter exclusion of the other who happened not to survive her. That could not have been the intention of the testator. I am satisfied that I am only carrying his intention into effect, and putting a rational interpretation upon his will by declaring, as I do, that the share of the property given to Mrs. *Johnson* vested in her two daughters, and consequently that one moiety belongs to the Plaintiff, and the other moiety to the representatives of the daughter who died.

Solicitors: Messrs. *Senior, Attree, & Johnson.*

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1869
Feb. 23.

MARRIOTT *v.* ABELL.

Residuary Legatees—Death before Tenant for Life—Survivors or Survivor—Divesting Clause.

Bequest to *A. B.* for life, and after her decease to eight persons in equal shares, their interests therein to be vested from the time of the testator's decease; and in case of the death of any of the eight legatees before the tenant for life, the share or shares of him, her, or them so dying to be paid to the survivors or survivor equally. The eight residuary legatees survived the testator, but all died before the tenant for life:—

Held, that survivorship was to be referred to the death of the tenant for life; and that as none of the residuary legatees survived her, the divesting clause had no operation, and each of the residuary legatees took his original gift.

Crowder v. *Stone* (1) questioned.

GEORGE BUTTERWORTH, by will, dated the 29th of July, 1822, gave all his real and personal estate to trustees upon trust to convert the same into money, invest the proceeds as therein mentioned, and pay the income to *Martha Barton* for life if she should so long continue unmarried, and after her decease or marriage to pay, assign, and transfer the whole of the trust moneys, and the securities on which they should be invested, and the income thereof, to *Samuel Bower, Catherine Bower, John Marriott, Hannah Marriott,* and *Charles Butterworth,* in equal shares, their interests therein to be vested interests from the time of his decease. And he directed that in case *Charles Butterworth* should die before *Martha Barton* should die or be married, his share in the said moneys should be paid to his father, *Thomas Butterworth.*

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(1) 3 Russ. 217.

The testator made a codicil, dated the 20th of August, 1822, by which, after reciting the gift in remainder to the five residuary legatees, but not referring to the divesting clause as to *Charles Butterworth's* share, he proceeded as follows:—"Now I do hereby direct my trustees to pay, assign, and transfer the said moneys not only to the said *Samuel Bower, Catherine Bower, John Marriott, Hannah Marriott,* and *Charles Butterworth,* but also to *Elizabeth Ann Church,* daughter of *David Church, John Church,* and *Elizabeth Church,* son and daughter of *Charles Church,* in equal parts, shares, and proportions, to and for his, her, and their own use and benefit. And I do hereby direct that in case of the death of any of them before the death or marriage of the said *Martha Barton,* the share or shares of him, her, or them so dying shall go and be paid to the survivors or survivor of them equally, share and share alike; but in case the said *E. A. Church* shall die before that event, then I direct her share to be paid to her father, the said *David Church,* to and for his own use and benefit. And in all other respects I confirm my said will."

The testator died soon after the date of his codicil, leaving all the persons named in his will surviving him.

The eight residuary legatees all died in the lifetime of the tenant for life. *John Church* died first, in 1833; *Hannah Marriott,* the last survivor, died in 1860. *Martha Barton,* the tenant for life, died in 1864, without having married. The present bill was filed by the personal representatives of *Hannah Marriott* for the administration of the estate, and the cause now came on for further consideration.

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Mr. *Cadman Jones*, for the Plaintiffs:—

The Plaintiffs contend that, as to each share, the survivors are to be ascertained at the time when the share went over, as was decided in *Crowder* v. *Stone* (1), which has been followed in every case in which it has been cited.

[The VICE-CHANCELLOR:—If *Harrison* v. *Foreman* (2), and *Sturgess* v. *Pearson* (3), had been brought to the attention of Lord *Lyndhurst*, he would probably have decided that case otherwise.]

Before those cases can have any bearing, it must be determined that there were no persons who could take the share of a legatee as survivors, and the question to what period survivorship is to be referred is not affected by those authorities. The present case is quite distinct from such cases as *Cripps* v. *Wolcott* (4), where it is necessary to refer survivorship to one fixed period. *Bright* v. *Rowe* (5), and *Ive* v. *King* (6), are precisely in point. *White* v. *Baker* (7) supports the Plaintiff's case, and in *Wilmott* v. *Flewitt* (8) Vice-Chancellor *Wood* recognises the authority of *Crowder* v. *Stone*, and treats the meaning attributed by it to "survivors" as being the one generally to be adopted in cases where the shares of tenants in common are given over to survivors. In *Littlejohns* v. *Household* (9) the words were peculiar, and pointed to the period of distribution as the period of survivorship; and neither *Crowder* v. *Stone*, *Bright* v. *Rowe*, nor *Ive* v. *King*, were cited. In *Cambridge* v. *Rous* (10) *Crowder* v. *Stone* was not referred to. In *Young* v. *Robertson* (11) no case applicable to the present question was referred to, the only point argued evidently having been, what was the meaning to be attributed to the word "vested;" so that case really is not an authority against us. *Hannah Marriott* then had vested in her her own original share and accrued shares from the other residuary legatees; and as no one survived her, she retained her

(1) 3 Russ. 217.
(2) 5 Ves. 207.
(3) 4 Madd. 411.
(4) Ibid. 11.
(5) 3 My. & K. 316.
(6) 16 Beav. 46.
(7) 2 D. F. & J. 55. 6 Jur NS 591
(8) 13 W. R. 856. 11 Jur NS 620
(9) 21 Beav. 29.
(10) 25 Ibid. 409.
(11) 4 Macq. 314; 8 Jur. (N.S.) 825.

original share, as well as the accrued shares: *Harrison* v. *Foreman* (1); *Sturgess* v. *Pearson* (2); *Re Corbett's Trusts* (3).

Mr. *W. Barber*, for the executor of *Thomas Butterworth*, who was also the personal representative of the testator:—

I contend that there is nothing in the codicil to defeat the gift over of *Charles Butterworth*'s share to *Thomas Butterworth*, the clause of survivorship referring only to the three new legatees, and that this share now belongs to the estate of *Thomas*. The codicil does not take away the original gift by the will, but only introduces fresh persons to share in it.

Mr. *Chitty*, for the personal representatives of *Charles Butterworth*:—

The gift over of *Charles Butterworth*'s share was revoked by the codicil, which makes a different gift over of it on the same event. As to the period of survivorship, I support the case of the Plaintiffs. *Crowder* v. *Stone* (4) has never been questioned on this point: *Ranelagh* v. *Ranelagh* (5). The cases of *Sturgess* v. *Pearson* and *Harrison* v. *Foreman* could not be cited in *Crowder* v. *Stone*, for neither of them touched the questions there to be decided, viz., to what period survivorship was to be referred, the testator having in each of them by express words, about the meaning of which there could be no dispute, referred it to the death of the tenant for life. They establish, that where a gift over to survivors fails for want of a survivor, the original gift remains unaffected; but they furnish no help in ascertaining the period to which survivorship is to be referred.

Mr. *Rodwell*, for the personal representative of *John Church*, referred to *Page* v. *May* (6), but was stopped by the Court.

Mr. *Herbert Smith*, for the heir-at-law of the surviving trustee.

SIR R. MALINS, V.C.:—

The testator having by his will given his property after the death of *Martha Barton* to five persons, added by a codicil three

(1) 5 Ves. 207.
(2) 4 Madd. 411.
(3) Joh. 591. 6 Jur NS 339.
(4) 3 Russ. 217.
(5) 2 My. & K. 441, 448.
(6) 24 Beav. 323. 3 Jur NS 1047

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others, making eight, with a provision that if any of them died before the death of *Martha Barton* the share or shares of him, her, or them so dying should go to the survivors or survivor of them. All the eight died in the lifetime of *Martha Barton*, the tenant for life, and the question, under these circumstances, is, who became entitled to the residuary estate. Before I go into the main point, I may advert to the argument of Mr. *Barber*, that the words added by the codicil, "I do hereby direct that in case of the death of any of them" applied only to the three residuary legatees who were added by the codicil. As all eight formed a class, my opinion is that those words referred to the whole class, and consequently that if the clause of survivorship has come into operation, it operates upon the share of *Charles Butterworth*, and that whether it has, in the events which have happened, taken effect or not, it is inconsistent with and revokes the gift over to *Thomas Butterworth*. Then as to the main question, the construction relied on by Mr. *Jones* and Mr. *Chitty* is, that the words "survivor or survivors" apply on the death of each person, so that as each died his or her share went to the then survivors, that is, when the first died his share went to the seven who survived; when the next one died, his share went to the six, and so on; the consequence of which would be, that of all those persons, the only one who would not transmit any interest to a representative would be that one who died first; on the second dying, his original eighth share would go over to the six survivors; but his seventh of an eighth acquired from the first who died would not, and so on, on the death of each succeeding one.

Now this would be a very curious disposition of the property, and, in my opinion, probably opposed to the intention of the testator. All these are cases of intention, and the rules adopted by the Court have regard to the probable intention. One sees that if there be a gift either of real or personal estate to one for life or a limited period, and then a gift to a class, and the "survivors or survivor" of that class, the word "survivor" is uniformly referred to the period of distribution. That was settled by *Cripps* v. *Wolcott* (1), with respect to personal estate, and now by *Gregson's Trust Estate* (2), overruling *Doe* v. *Prigg* (3), as to real estate. In

(1) 4 Madd. 11.
(2) 2 D. J. & S. 428.
(3) 8 B. & C. 231.

10 Jur N.S. 1138

this case it is not disputed that if there had been a gift to *Martha Barton* for life, and after her death to the eight, or the survivors or survivor of them, then if one only survived her, that one would have taken the whole, and that if all eight died in her lifetime, there being no person or persons answering the description of "survivor or survivors," the original gift in favour of the whole class would be undisturbed, and the property would go to the representatives of the eight. But it is not a gift in that form, and the Court must determine to what period the words of survivorship refer. What is the testator directing his attention to? There is a gift in the will to *Martha Barton* for life, and after her decease or marriage to the five persons named in the will, to whom three more are added by the codicil, and then there is a clause of survivorship in the event of any of the legatees dying before the death of *Martha Barton.* The testator was directing his attention to the death of *Martha Barton,* and the words "survivor or survivors" must be taken as referring to that period, and at that time, there being no person to answer the description, the gift over cannot operate. I drew counsel's attention to *Sturgess* v. *Pearson* (1), which is in principle the same as the present case, where there was a gift to a mother for life, remainder to her three children as tenants in common; there there was the divesting clause, restricting it to such as should be living at her decease. All three died in her lifetime. Was that to deprive them of all interest? Therefore the Court had the choice of holding that the gift failed altogether, or that the divesting clause had no operation, and the decision in that case was, that the original interests of the three children remained undivested, and passed to their representatives.

In *Harrison* v. *Foreman* (2) Sir *W. Grant* held that the original gift remained where there was a gift over to the survivor living at the death of the tenant for life, and none of the legatees did survive that event. It is said that the construction I am putting on the words "survivor or survivors" is opposed to Lord *Lyndhurst's* decision in *Crowder* v. *Stone* (3), a decision no doubt in favour of Mr. *Jones*' and Mr. *Chitty's* contention, that on the death of each

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(1) 4 Madd. 411.

(2) 5 Ves. 207

(3) 3 Russ. 217

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his share went to the then survivors. But however eminent Lord *Lyndhurst* was, and however much weight attached to his opinion, my impression is that his decision never was followed in any case in which *Harrison* v. *Foreman* (1) and *Sturgess* v. *Pearson* (2) were cited, *Littlejohns* v. *Household* (3) being opposed to it as well as *Cambridge* v. *Rous* (4). I think, therefore, the law is now settled that where there is a tenancy for life, with remainder to children and the survivor and survivors, that will carry the whole fund to the survivors, and that if none survive the tenant for life the divesting clause has no operation. Here the testator was directing his attention solely to the death of *Martha Barton*, and intended those who survived her to take, not those who survived each other. But there being none surviving her, the original gift remains, and there will be a declaration to that effect. This applies also to the share of *Charles Butterworth*; his original gift remains.

Solicitors for the Plaintiffs: Messrs. *Rickards & Walker*.
Solicitor for the Defendant: Mr. *Barker*.

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In re POTTER.

Infant Married Woman—Petition for Settlement—18 & 19 *Vict. c.* 43.

Upon the Petition, by next friend, of an infant married woman, not a ward of Court, for a settlement of her property:—

Held, that the Court has no power over the property of an infant, not being a ward of Court, who marries after attaining the age at which she is capable of contracting marriage; and that no jurisdiction is in such a case conferred by the Act 18 & 19 Vict. c. 43.

THIS was the Petition of *Elizabeth Potter*, an infant of seventeen years old, by *Alfred Walford*, her uncle and next friend.

It stated that *Elizabeth Moreton*, the grandmother of the Petitioner, by her will, dated in September, 1862, gave and devised all her real and personal estate to three trustees, upon trust as to one moiety thereof to receive and invest the rents and annual produce until the Petitioner should have attained twenty-one or been married under that age with the consent of her guardians. And after she should have attained such age, or been married with consent, then as well as to the undivided moiety as to the investments thereof, upon trust to pay the rents, dividends, and annual produce to the Petitioner for life, for her sole and separate use, without power of anticipation, and after the decease of the Petitioner, then upon trust for such person or persons as she should by deed or will appoint, and in default of appointment upon trust for all the children of the Petitioner, in equal shares. And the testatrix declared that if the Petitioner should not live to attain a vested interest in the property, then upon the trusts therein mentioned. The will contained no trust or disposition of the property in the event of the Petitioner attaining a vested interest and dying without having exercised her power of appointment, and without having had a child who should attain a vested interest.

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(1) 5 Ves. 207.
(2) 4 Madd. 411.
(3) 21 Beav. 29.
(4) 25 Ibid. 409.

The Petitioner's father and mother were both dead, and she had been placed under the care of a clergyman for education.

On the 3rd of June, 1868, the Petitioner (having neither testamentary guardian, nor guardian appointed by this Court), without the consent or knowledge of any member of her family, intermarried with *Richard Porter*, who was an infant of nineteen years, and was dependent for his subsistence on his daily labour as a framework knitter. His father was dead, and his mother was in receipt of parish relief.

The Petitioner would be entitled, on attaining twenty-one, to one moiety of real and personal estate exceeding £4000.

The Petition prayed that a proper settlement of the property might be sanctioned by this Court, under or by virtue of the Act 18 & 19 Vict. c. 43.

Mr. *Mackeson*, Q.C., and Mr. *Warner*, in support of the Petition:—

The Court has power under the Act 18 & 19 Vict. c. 43, to make a settlement after marriage upon an infant. The words of the first section give power to any infant to apply to the Court to sanction a settlement upon marriage. The jurisdiction founded upon that Act is not dependent upon the fact of the infant being a ward

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of Court. In *Powell* v. *Oakley* (1) it was held that a post-nuptial settlement of an infant's estate was rendered valid by the above Act when made with the approbation of the Court. And in *Wortham* v. *Pemberton* (2) Vice-Chancellor *Knight Bruce* held that it was not necessary that the bill should be filed with the consent of the infant.

A bill may, therefore, be filed on behalf of an infant married woman without her consent, and the uncle was justified, under the circumstances of this case, in coming to the Court to preserve the property on behalf of the infant.

Mr. *W. Pearson*, for *R. Potter*, the husband of the infant:—

The Court has no jurisdiction to compel a settlement against the consent of an infant married woman. The Act of Parliament is merely an enabling Act giving permission to an infant to apply to the Court to validate an ante-nuptial settlement. This Petition is filed against the wish of the infant, and the property is already sufficiently secured for the life of the infant by the will under which she takes the property. The parties were of full age for contracting marriage, and there are no circumstances rendering such a Petition requisite. The next friend ought, therefore, to be ordered to pay the costs occasioned by this unnecessary proceeding.

Mr. *Stirling*, for the trustees of the settlement.

SIR R. MALINS, V.C.:—

I have no jurisdiction over the property of any persons, male or female, not being wards of Court, who marry after they shall have attained the age at which they are capable of contracting marriage. The husband in this case is nineteen and the wife seventeen, both were therefore capable of entering into a contract of marriage, and they are now lawfully married. If the license for the marriage was obtained by means of a false declaration, that would be punishable under the criminal law, but it would not give me jurisdiction over the property. If the infant had been a ward of Court, then, according to the decision in *Powell* v. *Oakley*, the Court might have imposed terms on the husband that a settlement should be

(1) 34 Beav. 575.

(2) 1 De G. & Sm. 644.

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made. It might be proper and expedient to settle the property in this case, but if I were to make an order for a settlement, it would not be binding if I have no jurisdiction, because when the young lady comes of age she may apply to the Court to set it aside.

In my opinion the Act does not give me jurisdiction to sanction a post-nuptial settlement where the lady is not a ward of Court.

There is no doubt that a bill might be filed for a female infant without her consent, but these proceedings are taken against her consent and that of her husband, and it asks that a post-nuptial settlement may be made in pursuance of an Act of Parliament which provides that the application shall be made by the infant or her guardian; and in this case the Petitioner is not her guardian.

With regard to the case of *Wortham* v. *Pemberton* (1), the circumstances were very peculiar, and the conduct of the husband had been so grossly improper that Vice-Chancellor *Knight Bruce* probably was induced to go farther than he otherwise would have done, and to make an order which was not strictly within the powers of the Court. At any rate, I should not feel inclined to follow that decision under any circumstances which were not precisely similar.

With regard to costs, as I am of opinion that I have no jurisdiction, and as this property is already effectually settled upon the infant during her life, I do not think that the next friend was justified in interfering and putting the parties to an expense which is a great hardship upon them. The Petition must, therefore, be dismissed with costs.

Solicitors for the Petitioner: Messrs. *Skilbeck & Griffith.*

Solicitors for the Respondent: Messrs. *Murray & Hutchins.*

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(1) 1 De G. & Sm. 644

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1869
Feb. 24.

DIXON v. HOLDEN.

Injunction—Injury to Reputation—Damage to Property.

The Court has jurisdiction to restrain the publication of any document tending to the destruction of property, whether consisting of money or of professional reputation by which property is acquired.

The publication of a notice stating that the Plaintiff was a partner in a bankrupt firm restrained.

13 Eq 358, 360, -1
619, 620-1-2,
17 Eq 195-7,
10 Ch 142-3, -7
19 Eq 215,
10 Ch 301
6 Ch D. 582.
589
10 Ch D 296
300-1
3 CPD. 342
14 Ch D 768
18 Ch D 558

THE Plaintiff, *William Dixon*, was a merchant at *Liverpool*. Previously to December, 1850, *Hugh Dixon* and *Launcelot Dixon* carried on business at *Liverpool* in partnership under the firm of *Dixon Brothers*, and at the same time *Hugh Dixon* and *Launcelot Dixon* carried on business at *San Francisco* in partnership with the Plaintiff and *Alexander Forbes* as merchants under the firm of *Dixon, Forbes, & Co.*, which latter partnership expired in 1851, and the dissolution was duly published at *San Francisco*. The Plaintiff and *A. Forbes* had no interest in the house of *Dixon Brothers*. On the 24th of December, 1850, the firm of *Dixon Brothers* stopped payment, and executed an assignment for the benefit of their creditors, and *John Holden*, the Defendant, acted as solicitor for them in winding up their affairs. In December, 1851, *Dixon Brothers* were adjudicated bankrupts, and in the course of the proceedings in bankruptcy it appeared that neither the Plaintiff nor his firm of *Dixon, Forbes, & Co.* were indebted to *Dixon Brothers*.

The Plaintiff returned from *San Francisco* in 1852, and had been for the last eleven years in co-partnership with his brothers *Hugh* and *Launcelot Dixon* at *Liverpool* trading under the firm of *W. Dixon & Co.*, and had a high standing in *Liverpool*. For some years past the last-mentioned firm had ceased to employ the Defendant *John Holden* or his son *George Holden*, who was now in partnership with him, as their solicitors.

On the 23rd of September, 1867, the Defendants forwarded to *Hugh Dixon* a printed notice, intended to be published as an advertisement in the newspapers, to the effect that the joint creditors under a petition for adjudication of bankruptcy filed in

But see Mulkern v Ward LR 13 Eq 619. VCW
and Prudential Ass'y v Knott LR 10 Ch 142 LC & LJJ
Fisher v Apollinaris Co LR 10 Ch 297

December, 1851, against *Hugh Dixon* and *Launcelot Dixon*, were requested to meet on a day to be named, consequent upon the recent new choice of an assignee in the place of *John Hamilton* and *W. Sims*, both deceased, when the creditors who had proved and those who had not proved their debts under the joint estate would be consulted upon the outstanding Californian joint assets, stated in the balance sheet filed under the petition at £7671, and on other joint assets outstanding, also on there being two additional solvent partners, *W. Dixon* and *A. Forbes*, and the joint creditors were to assent or to dissent from measures for ascertaining the said joint assets, and realizing the same amongst the joint creditors.

As the above notice contained an allusion to the Plaintiff, and also statements which he considered were calculated to damage his character and the credit of his firm, a solicitor was consulted, and a letter was written by him to the Defendants, protesting against the Plaintiff's name being used as intended in the advertisement. In reply to this the Defendants asserted their belief that the Plaintiff was a partner with his two brothers, and alleged various circumstances to the prejudice of the character of the Plaintiff, concluding thus: "We shall be glad to hear from you again; and in the meantime we hold our advertisement, which is intended for as many local papers as there are diverse residences of creditors, for a day or two."

The Plaintiff alleged that the Defendants were well aware that the Plaintiff never was a partner, and never had any interest in the firm of *Dixon Brothers*, and that the firm of *Dixon, Forbes, & Co.* was not indebted to *Dixon Brothers* at the time of their bankruptcy, and that even if there were any accounts between the respective firms unsettled the same were now barred by the *Statute of Limitations*; that the Plaintiff had always held a high character for mercantile honour and integrity at *Liverpool*, and the only object of the Defendants in publishing the aforesaid notice was by their insinuations of fraud and complicity to extort money from the Plaintiff; that the effect of the publication of such notice would be most prejudicial and injurious to the mercantile reputation of the Plaintiff and his firm, and would, doubtless, have the effect of seriously damaging his business; and that the Defendants still

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threatened and intended to publish the said notice, and to insert the same as an advertisement in divers local and other papers.

The bill prayed that the Defendants might be restrained by injunction from publishing the said printed notices as advertisements in any local or other paper, and from, in any manner, distributing them, and that all the said printed notices might be ordered to be delivered up to be destroyed, and that the Defendants might pay the costs of the suit.

An interim injunction had been granted, and the cause now came on upon the hearing.

Mr. *Little,* Q.C., and Mr. *Proctor,* for the Plff ~~in support of the motion :—~~

This is a case in which the Plaintiff would sustain an injury to his reputation and to his business by the publication of the advertisement printed by the Defendants. The Court has therefore power to interfere by injunction to restrain such conduct. In *Routh* v. *Webster* (1) the Court granted an injunction to restrain the directors of a company from using the name of the Plaintiff without authority as a trustee of the company, on the ground that he might be thereby subject to responsibilities; and in *Bullock* v. *Chapman* (2) an injunction would, no doubt, have been granted to restrain the Defendants from returning the name of a person as a shareholder when he was not so in fact, if the case had been perfectly clear upon the evidence. *Springhead Spinning Company* v. *Riley* (3) is in all respects an authority in support of this application.

Mr. *Glasse,* Q.C., and Mr. *Morris,* for the Defendants :—

If the Plaintiff has any case against the Defendants, his remedy is at common law upon an action for libel. This is shewn by the case of *Fleming* v. *Newton* (4), where Lord *Cottenham* said that granting an injunction to restrain the publication of a libel was interfering with the jurisdiction conferred upon juries by the Act 55 Geo. 3, c. 42, to try all matters of libel and defamation. A jury, he said, was the proper tribunal for such injuries. There is no proof of any wrong done to the Plaintiff; it is simply an inter-

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(1) 10 Beav. 561.
(2) 2 De G. & Sm. 211.
(3) Law Rep. 6 Eq. 551.
(4) 1 H. L. C. 363.

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ference with his name. He alleges that it will have a damaging effect upon his business; but there is no affidavit in support of that allegation. At the utmost it is an anticipated injury, and in such a case this Court cannot interfere. The intended meeting of creditors was for the purpose of taking into consideration whether the Plaintiff was a partner or not, and how far he might have made himself liable to the creditors. This was a perfectly justifiable object, and no damage could arise to the Plaintiff's character or business by raising this question at the meeting.

In *Clark* v. *Freeman* (1) Lord *Langdale* refused to grant an injunction where the alleged injury was to the reputation of the Plaintiff.

Mr. *Little*, in reply:—

Wherever an injury complained of is one that will affect the property of a person, then the Court of Chancery has jurisdiction, notwithstanding that the Defendant may be punishable at law for a libel. The fact that a merchant's reputation is injured is of itself sufficient to prove that his property will be damaged.

Sir R. Malins, V.C., after fully stating the circumstances set forth in the bill, and the correspondence between the parties, continued:—

The Defendants have no right to suggest, as they do by the notice they threaten to publish, that the Plaintiff was a partner in a bankrupt firm. It is sworn, and I am satisfied it is correctly sworn, that the present firm of *W. Dixon & Co.* has nothing to do with the firm of *Dixon Brothers,* which was bankrupt; yet the publication intended to be circulated by the Defendants states, not only that he was a member of that firm, but that he has concealed the fact from the creditors, and has thereby defrauded them of the contributions which, as partner of that firm, he would be bound to make, and which contributions, if made, would have resulted in payment of the creditors in full. When remonstrated with in a very proper letter written by the solicitor, the Defendants, instead of apologizing to Mr. *Dixon* for the grievous offence they had been guilty of, actually repeat the offence in a more

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(1) 11 Beav. 112.

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aggravated form, saying that they will bring this gentleman to the bar of justice, and will prove that he was a member of the bankrupt firm.

I am told that a Court of Equity has no jurisdiction in such a case as this, though it is admitted it has jurisdiction where property is likely to be affected. What is property? One man has property in lands, another in goods, another in a business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these things (even in a man's good name) is, in my opinion, destroying property of a most valuable description. But here it is distinctly sworn to, and cannot be denied, that the effect of this will be seriously damaging to the Plaintiff's business of a merchant.

But see
10 Ch 146

Now the business of a merchant is about the most valuable kind of property that he can well have. Here it is the source of his fortune, and therefore to be injured in his business is to be injured in his property. But I go further, and say if it had only injured his reputation, it is within the jurisdiction of this Court to stop the publication of a libel of this description which goes to destroy his property or his reputation, which is his property, and, if possible, more valuable than other property.

In this case I go on general principle, and I am fortified by authority. General principle is in favour of it, but authority is not wanting.

It is contended that Lord *Cottenham* has laid it down in *Fleming* v. *Newton* (1) that this Court has no jurisdiction to restrain the publication of a document like this. When I look at the report, I find that Lord *Cottenham* abstains from laying down a rule in that case, but expresses a hope that the Scotch Judges would take care to exercise the jurisdiction of the Court with discretion and consistency.

But there are cases in this Court going to the point. I had occasion to consider the subject very fully in the case of *Spring-head Spinning Company* v. *Riley* (2). That was an injury to property, and on that ground I overruled the demurrer. I then considered all the authorities on the subject as to where this Court would grant, or would not grant, an injunction to prevent a publication which had the effect of injuring property. The case of *Routh* v. *Webster* (1) is an authority going the whole length of what is asked here. In that case a joint stock company was established having for its only object the carrying passengers by steam-boat and omnibus at a cheap rate. The Defendants, the provisional directors, had published prospectuses in which the name of the Plaintiff was used without his authority as a trustee of the company. They also paid moneys into the bankers of the company to the Plaintiff's account as trustee. The Plaintiff, conceiving that he might be subjected to responsibility by the unauthorized use of his name, filed his bill against the directors, and moved for an injunction to restrain them from using his name in connection with the company. Lord *Langdale* granted the injunction, and observed that it would be a warning to the Defendants not to use the names of other persons without their authority. The Defendants were not to be allowed to use the names of any persons they pleased, representing them as responsible in their speculations and involving them in all sorts of liabilities.

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(1) 1 H. L. C. 363.

(2) Law Rep. 6 Eq. 551.

But see
10 Ch 146

The next case is that of *Clark* v. *Freeman* (2), in which Sir *James Clark*, the well-known physician, came to the Court for an injunction, complaining of his reputation having been injured because of the Defendant *Freeman* having advertised a pill as being from the Plaintiff's prescription, and Lord *Langdale* refused the injunction only because he did not think it likely that such a thing could possibly prove an injury to the reputation of a man in the position of Sir *James Clark*. I took the opportunity in the case of *Springhead Cotton Spinning Company* v. *Riley* (3), of stating what Lord *Cairns* said of the case of *Clark* v. *Freeman*, when giving judgment in *Maxwell* v. *Hogg* (4). That was a case to restrain the publication of a magazine, and Lord *Cairns* said, "It always appeared to me that *Clark* v. *Freeman* might have been decided in favour of the Plaintiff on the ground that he had property in his own name." I have already said that in my opinion the Court has jurisdiction in such a case, and has exercised it repeatedly to prevent such a state of things.

My observations in the *Springhead Spinning Company* are

(1) 10 Beav. 561.
(2) 11 Ibid. 112.
(3) Law Rep. 6 Eq. 551.
(4) Ibid. 2 Ch. 307, 310.

entirely applicable, and inasmuch as I am clearly of opinion that the injunction in this case was rightly granted, so I am now clear that it is my duty to make that injunction perpetual. The subsequent conduct of the Defendants has not mitigated in any way their offence. They have not come here in a tone of apology for this most improper and vexatious conduct, but, on the contrary, they have appeared rather to justify themselves than to apologize, and it has greatly aggravated the offence. In the decision I arrive at I beg to be understood as laying down that this Court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation. Professional reputation is the means of acquiring wealth, and is the same as wealth itself. On these grounds I have no hesitation as to the decision I ought to come to, and I have no doubt whatever as to the jurisdiction, or as to the conduct of the Defendants. That being so, the injunction will be made perpetual, with costs against both the Defendants.

13 Eq 361
But see
10 Ch 146

Solicitor for the Plaintiff: Mr. *W. W. Wynne.*
Solicitor for the Defendants: Mr. *H. C. Barker.*

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1868
Nov. 14.

FYTCHE *v.* FYTCHE

Election, Right of, in several Next of Kin—Separate Election—Annuity specifically charged in lieu of Dower.

A testator, by his will, made various bequests in favour of his wife, including some property to which she was entitled in her own right, and he also gave her an annuity, charged on specified real estate, in lieu of dower and freebench. The wife survived her husband, and during her life received the benefits given her by the will, but never elected whether to take under or against the will, and died intestate, leaving four next of kin, three of whom elected to take under the will, while the fourth, who was her administrator, elected to take against it:—

Held, that each of the next of kin had a separate right of election, that neither the election of the majority nor that of the heir and administrator bound the others, and that in taking the accounts on such election the annuity specifically charged in lieu of dower must be brought into account, credit being given for the due proportion of dower

JOHN FYTCHE died in 1855, having, by his will, dated in that year, given and bequeathed to his wife, *Ann Fytche*, certain personal property and an annuity of £300 a-year chargeable on his estate at *Legburn*, to be in lieu of dower and freebench. The testator also gave and bequeathed to his said wife, *Ann Fytche*, for her life, the interest and proceeds of "the *Witham Navigation* shares or securities, and of the principal moneys lately placed out at interest, the securities for which are now in her possession, which devolved upon me in her right by the will of a late brother."

Ann Fytche, the widow, died in 1865, and at the time of her death was the registered proprietor of sixty-four shares in the *Witham Navigation Company*, which shares were personal estate, and was entitled to a mortgage debt of £6000. It appeared that this was the only money which could be referred to by the words "principal moneys" in the will. Since the death of her husband she had been in receipt of the dividends on the shares and the interest on the £6000, and also received the annuity of £300 charged on the *Legburn* estate in lieu of dower.

Ann Fytche left four next of kin surviving her, three of whom elected to take under the will, while the fourth, who was the intestate's heir-at-law and administrator, elected to take against it. The question was also raised as to whether the £300 annuity should be brought into account.

Mr. *Cotton*, Q.C., and Mr. *Speed*, and Mr. *Pearson*, Q.C., and Mr. *R. Hawkins*, for the next of kin electing to take under the will:—

It is admitted that the intestate never elected whether to take under or against the will of her husband, and that being so, her next of kin must now elect: *Padbury* v. *Clarke* (1); and the persons entitled to three-fourths are at liberty to take under the will, although the person entitled to the remaining fourth may elect to take against it: *Ward* v. *Baugh* (2).

If the administrator elects against the will he must elect against

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(1) 2 Mac. & G. 298.

(2) 4 Ves. 623.

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it *in toto*, and must bring into account the £300 annuity in lieu of dower.

Mr. *Glasse*, Q.C., and Mr. *Nalder*, for the fourth next of kin, and administrator:—

There is no such thing as partial election, and the intestate not having elected the right of election falls on the administrator, who has the burden of debts, and he electing against the will, that binds the other three.

The question as to the £300 annuity is one that would arise between the owner of that estate and the annuitant, and it being a charge on a particular estate in lieu of the particular right of dower, the administrator, though claiming against the will in other respects, need not bring it into account: *Dillon* v. *Parker* (1); *East* v. *Cook* (2). If brought into account, an account must be taken of what the widow was entitled to in respect of dower.

Mr. *Cotton*, in reply.

SIR R. MALINS, V.C.:—

The main question raised in this case is, whether the widow not having elected, and there being four next of kin, three of whom elect to take under the will, they can bind the fourth next of kin, who is also the administrator, who elects to take against the will. I think not, but that all the persons interested have a right to exercise their judgment as to the way in which they will elect; and some may elect to take one way, and some the other. The case of *Ward* v. *Baugh* (3) is conclusive on this point, because there the tenant for life had done acts which amounted to a conclusive election, but her children in remainder were held not to be bound; and so in this case, the fourth person is not bound by the election of the three. Each has a distinct right to say which he chooses. Here the heir-at-law elects to take against the will, and the other three under it, and the consequence is, that those who elect to take against the instrument must give up all the benefits which they take under it.

(1) 1 Sw. 359, 404, n. (2) 2 Ves. Sen. 31.
(3) 4 Ves. 623.

The other question raised was as to the annuity of £300 given by the testator out of his own property charged on the *Legburn* estate, of which he was the owner; and that is expressly given as a satisfaction for and in lieu of the dower and freebench.

It has been contended for those who elect to take under the will, that those who elect to take against it must give up all the benefits conferred by the will, and must elect wholly; and with respect to the three there is no difficulty, because they all elect to take under the will, and therefore take the whole property which the testator gave to his widow by that instrument.

The sole difficulty is with respect to the one who takes against the will. It has been said that he is not bound to take the annuity of £300 into account, but that that sinks into the *Legburn* property, for the benefit of the owner of that estate. If he elects to take against the will, he is bound to take into account all the interest of the person under whom he claims; and if he elects not to take under the will, he must take it into account.

Electing, therefore, as he does, to take against the will, I think it is clear, as between himself and the others taking under the will, that he must bring into account every benefit given by the will, and, therefore, everything must be brought into account which the widow takes under the will, including the £300 a year. On the other hand, credit must be given to the administrator electing to take against the will for the one-fourth of the dower to which *Anne Fytche* would have been entitled, and in lieu of which the £300 annuity was bequeathed to her.

Solicitors: Messrs. *Coverdale & Co.*

V.-C. M.
1869
Jan. 16.

In re BEASNEY'S TRUSTS.

Presumption of Death at particular Period within Seven Years—Evidence of Death.

5 Ch 141-3-7
[illegible]
20 Eq 181-8,

A person who was entitled to the dividends on stock payable in April and October, applied for his dividends in April, 1860, and was last seen in August in the same year, when he was in a very bad state of health. He never applied for his half-yearly dividends in the ensuing October. It appeared that he was of very dissolute habits, and chiefly depended on the dividends for his maintenance. The question being whether he died before November, 1860:—

Held, that not having applied for the dividends due to him in October, 1860, and having regard to the state of his health when last seen, the presumption must be that he died before November, 1860.

THE question in this case was one of presumption of death. It appeared that *William Beasney*, who was a man of loose and drunken habits, had from time to time earned an uncertain income as a tailor, but that he had been supported mainly by his relatives, with whom he lived on friendly terms. In 1857 he became entitled to the income of a sum of £1000, and he punctually applied for the half-yearly dividends, which as soon as received he squandered in dissipation.

The last payment he received was in April, 1860, but no application was ever made by him for the October dividends; he was last seen in August, 1860, when he was in a very weakly condition, poorly clad, and suffering from pulmonary disease, and he then stated that he did not expect long to live, and that he would go to *New York* for the benefit of his health, but that he had no money to pay for the voyage. Advertisements had also been inserted in the newspapers offering a reward for any intelligence about him, but none had been received.

These facts were proved by an affidavit of the administatrix of *Emma Elizabeth Beasney*, the half-sister of *William Beasney*. She died on the 14th of November, 1860, and if she survived *William Beasney* would have been entitled to the trust fund as his sole next of kin, and her administatrix now presented a Petition asking for payment out of Court of the trust fund to her, on the presumption by the Court from the above facts, that *William Beasney* predeceased his half-sister.

Mr. *Glasse*, Q.C., and Mr. *Daly*, for the Petitioner:—

It appears that *William Beasney* regularly applied for his dividends up to April, 1860; but no application was made by him for the October dividends. The facts of his not having been heard of since August, 1860, the state of his health at that time, and his dissipated habits, are sufficient to lead to the presumption that he died before September, 1860, in which event the Petitioner is entitled to the fund. [They referred to *Doe* v. *Nepean* (1); *In re Benham's Trusts* (2); *In re Henderson's Trusts*, before the Master of the Rolls, 20 June, 1868.]

Mr. *G. O. Morgan*, for parties entitled in the event of *William Beasney* having survived his sister:—

Although when a man has not been heard of for seven years the Court presumes him to be dead, still the *onus* of shewing that he was dead at any particular time within that period lies upon the person alleging death at that time. In the present case, the time between which *William Beasney* was last heard of and the death of his sister is very short, and the only evidence tending to shew that he was dead at that time are the statements of the Petitioner herself, and the fact that he did not apply for the October dividends, which might be accounted for in a variety of ways. [He referred to *Thomas* v. *Thomas* (3).]

SIR R. MALINS, V.C.:—

I quite adhere to the general rule laid down in *Doe* v. *Nepean*, and many other cases, that where a person has not been heard of for seven years the *onus probandi* of shewing that he died at any particular period within the seven years lies upon the person setting up such earlier death.

William Beasney was last heard of in August, 1860, and therefore must now be presumed to be dead; and the question is, whether, having regard to the facts of the case, he must be pre-

(1) 5 B. & Ad. 86.

(2) Law Rep. 4 Eq. 416.

(3) 2 Dr. & Sm. 298.

sumed to have died between that date and the 14th of November, 1860, when his sister died, in which event she would have become entitled to the fund.

In the case of *In re Henderson's Trusts*, which has been referred to, the Master of the Rolls came to the conclusion that the fact that the person presumed to be dead had not applied for a half-yearly payment of an annuity for which he had hitherto regularly applied, and on which he chiefly depended for his maintenance, was sufficient to lead to the presumption that he died before such payment became due; and that seems to me to be a sound conclusion. Applying the same principle to the present case, *William Beasney* was of drunken habits, and when last seen was in so emaciated a state that his death might have been expected at any time. How can his never applying for his October dividends be accounted for except on the presumption that he was dead. With regard to the suggestion that he may have gone to *America*, it appears that he had no means, and it is not probable that he would have done so without communicating with his relatives, with whom, notwithstanding his habits, he was on affectionate terms.

I therefore come to the conclusion, on the facts of this case, and following *In re Henderson's Trusts*, that *William Beasney*, having made no application for the October dividend, must be presumed to have been then dead; as I am satisfied that had he been alive he would have applied for them; and therefore that his half-sister survived him and became entitled to the trust fund, which must now be paid out to the Petitioner as her administratrix.

Solicitor for the Petitioner: Mr. *J. Mote.*
Solicitor for the Respondents: Mr. *R. Plowman.*

LIPSCOMB *v.* LIPSCOMB.

V.-C. M.
1868
Nov. 6.

Mortgagor and Mortgagee—Original Debt and Further Charge—Realty and Personalty—Apportionment.

Real estate was mortgaged to secure £1500; and by a subsequent deed the same realty, together with other realty, was mortgaged to secure the same debt and an additional debt; and a policy of assurance and other personalty were assigned as a further security.

The mortgagor having died intestate:—

Held, that as between the administrator and heir-at-law the estate originally mortgaged was primarily liable to the payment of the £1500; and that the additional debt must be rateably apportioned as between the realty and personalty comprised in the second deed.

12 Eq 542-8.
8 Ch 185.
7 Ch D. 655-6.
10 Ch D 460
4 R-367-5
16 Ch D. 217
225

SPECIAL CASE.

In 1851 *Charles Lipscomb* mortgaged freehold estates to secure £1500 and interest.

By an indenture dated in February, 1861, after reciting that *Charles Lipscomb* was indebted to *John Christmas* in £950, and that the mortgage debt of £1500 was still owing, it was witnessed, that in consideration of the sum of £1500 so due and owing under the mortgage of 1851, and of the sum of £950 due to the said *John Christmas,* making together the sum of £2450, the said *Charles Lipscomb* conveyed unto *John Christmas* in fee the hereditaments comprised in the mortgage of 1851, and other realty, subject to a proviso for redemption on payment to *John Christmas* of the sum of £2450 and interest. And by the same deed, by way of further security, *Charles Lipscomb* assigned to *John Christmas* a policy of assurance on his own life, and other personalty, subject to the proviso for redemption in the same indenture contained concerning the freehold hereditaments thereby conveyed. *Charles Lipscomb* died in 1867 intestate, and *John Christmas* received the policy-money, and retained it in part satisfaction of his mortgage debt; and the question now arose, as between the administrator and heir-at-law of the intestate, as to how the different estates comprised in the indenture of mortgage were liable to the payment of the mortgage debt.

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Mr. *Joshua Williams,* Q.C., and Mr. *Shebbeare,* for the Plaintiff, the administrator:—

The original debt of £1500 was not released by, or merged in, the indenture of 1861. In *In re Brettle* (1) the primary charge was held to be merged in the subsequent charge; but that is not so in this case, where the first charge has not been paid off, but only the interest; no prudent mortgagee would give up his original security. *Phillips* v. *Gutteridge* (2) shews that there was no extinguishment of the original debt. [An argument founded on *Locke King's Act* (17 & 18 Vict. c. 113) was also raised, but was abandoned.]

Mr. *Glasse,* Q.C., and Mr. *Freeman,* for the Defendant, the heir-at-law:—

The security created by the deed of 1851 became merged in the security created by the deed of 1861, and under that deed the realty and personalty are liable to the whole debt of £2450, therefore the personalty, including the policy of assurance, which was to be held subject to the former proviso for redemption, must be exhausted before the realty can be made liable. *Phillips* v. *Gutteridge* differs from this case; the question there being as between the mortgagee and subsequent incumbrancers, while this is one as between the administrator and heir-at-law.

Sir R. Malins, V.C.:—

The question in this case arises under the deed of 1861, because it is clear that if the intestate had died before that date, the freeholds comprised in the indenture of 1851 would alone have been liable to repay the £1500; but by the indenture of 1861 the intestate mortgaged the policy of assurance and other property to secure the whole debt of £2450.

Mr. *Locke King's Act* does not affect the liability of the properties. The Legislature, after declaring that the land charged should, as between the different persons claiming through or under the deceased, be primarily liable to the payment of all mortgage debts with which the same should be charged, added a proviso that the rights of mortgagees to obtain payment out of the personal estate were not to be thereby diminished. But that proviso is only for the protection of mortgagees.

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(1) 2 D. J. & S. 244.

(2) 4 De G. & J. 531.

The effect of the deed of 1861 was to retain the original mortgage security for the £1500, to make that estate subject also to the further charge, and to add to that security (as regards that portion of the debt) the other estate and the policy of assurance. If I am right in saying that if *Charles Lipscomb* had died the very day before the execution of that deed, the estates comprised in the first mortgage would have been primarily liable, what is there in the deed to make any difference in that respect?

I am of opinion that the estate originally mortgaged remains the primary security for the £1500, and that the £950 must be apportioned upon the land and the policy of assurance rateably. The costs must come out of the personal estate.

Solicitors for the Plaintiff: Messrs. *Hensman & Nicholson.*

Solicitors for the Defendant: Messrs. *Senior, Attree, & Johnson.*

V.-C. J.
1869
March 12, 15,
19, 24.

EARL OF DUNDONALD *v.* MASTERMAN.

Solicitor and Client—Liability of innocent Members of the Firm—Misappropriation.

18 Eq 626, 632
24 LD 1342
735 7-8

Money received by one member of a firm of solicitors in the course of the management and settlement of the affairs of a client of the firm, is money paid to the firm in the course of their professional business; and, consequently, the members of the firm are liable to make good any loss occasioned by the negligence or dishonesty of their partner by whom such money was received.

THIS was a bill for the purpose of rendering the Defendants *Masterman* and *Upfill*, who were solicitors, liable for all moneys of the Plaintiff received by their partner, the Defendant *Brutton*, and misapplied by him to his own use.

The Plaintiff, upon the death in 1860 of his father, Admiral *Cochrane*, afterwards Earl of *Dundonald*, of whom he was executor, became entitled as devisee and legatee under his will, and subject to his debts, to property in the island of *Trinidad*, to a manufacturing business at *Hackney Wick*, and to a share or interest in certain claims on the Brazilian Government in respect of his father's naval services, subject as to such claims to sums payable to his brothers and others, and also to other property. In November, 1864, the Plaintiff being at the time considerably embarrassed in his affairs, chiefly from the non-performance of a contract by a company for the purchase of his *Trinidad* property, and from the delay in obtaining a settlement of the Brazilian claims, retained the firm of *Masterman, Brutton, & Upfill* to act as his solicitors, and especially for the purpose of realizing his assets and effecting some arrangement with his creditors, two of whom had recently levied executions. The Defendant *Brutton*, as also his partners, had, previously to this retainer, been a stranger to the Plaintiff, and was the member of the firm who attended principally, if not entirely, to his business, and communicated upon it with him both personally and by letter, and, during his absence from *England*, with Lady *Dundonald*, who assisted Plaintiff in the management of his affairs. The communications between Lord *Dundonald* and *Brutton* were of a very confidential nature, but it appeared that they were always charged for by the firm in their bill of costs. In order to facilitate an arrangement with his creditors the Plaintiff was induced, by the advice of *Brutton*, to execute a deed of trust for the benefit of his creditors. *Brutton*, in the first instance, proposed that he should be named as sole trustee, but on the Plaintiff objecting, the name of *Masterman* was added. This trust deed, by which the Plaintiff's interest in the *Trinidad* property, subject to the contract with the company, was assigned to *Brutton* and *Masterman*, who were thereby appointed the true and lawful attorneys and attorney of the Earl, to receive the purchase-money, to adjust and settle all accounts between the Earl and his creditors, and generally to act for the Earl, and to pay and satisfy his creditors rateably, was dated the 2nd of November, 1864, and was referred to in the bill of costs of the firm as "an assignment of all your interest in the *Trinidad* property to us in trust, to avoid any further attachments being issued."

The bill alleged that *Masterman* and *Brutton* executed this deed, and accepted the trusts thereof, and acted through their firm in the execution of such trusts.

In January, 1865, the firm obtained the execution by the Plaintiff and his wife of a mortgage for £1500, and the money was received by the firm, and applied in satisfying two of the more pressing creditors. About this time the Plaintiff (then at *Boulogne*) signed, in contemplation of his going to *Brazil*, an authority for *Brutton* to receive from the *Trinidad Company*, with whom a new contract had been negotiated and concluded by the firm, all moneys payable under the new contract. The purchase-money of the *Trinidad* property, amounting to £16,000, and payable by instalments, was received by *Brutton*, and applied, with the exception of a very small balance, in various payments on account of the Plaintiff. In March, 1865, the Plaintiff proceeded to *Brazil* to prosecute his claims against the Government there, and immediately before leaving *England* he executed a deed, dated the 20th of March, 1865, by which he assigned to *Masterman* and *Brutton* (thereby constituted his attorneys) all moneys to be recovered from the Government of *Brazil*, in trust (1) to pay Messrs. *Masterman, Upfill, & Brutton*, and the survivor or survivors of them, all costs, charges, and expenses already incurred, or to be incurred,

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for the preparation and execution of the deed, and in the execution of the trusts thereof; (2) to satisfy the Earl's creditors rateably; and (3), to pay the ultimate residue, after satisfying all the creditors in full, to the Earl.

A power of attorney was also prepared by the firm, by which the Plaintiff appointed his wife and *Brutton* his true and lawful attorneys in his name to collect, and get in, and receive all moneys then due and owing, or which at any time thereafter should be due and owing, to Plaintiff, and also, in his name and behalf, to adjust and settle all or any of his accounts with any persons or companies with whom he had or might have any transactions.

Another deed, dated the 17th of April, 1865, was executed by Plaintiff immediately before his leaving for the *Brazils*. By this deed the Plaintiff ratified the several recited payments and retentions by *Masterman* and *Brutton* in the execution of the trusts and powers in the several recited indentures, and released *Masterman* and *Brutton* from all claims on account of the sums so paid and retained.

The Plaintiff left for *Brazil* in April, 1866, and while there he succeeded in obtaining from the Brazilian Government £5695 6*s.*, which was remitted to this country by means of a bill payable to the joint order of the Countess and *Brutton*.

Lady *Dundonald*, according to the allegations of the bill, by the advice of *Brutton*, who went down to *Ryde*, where she was staying, indorsed and delivered the bill to him, in order, as he said, that he, on behalf of his firm, might get it discounted, and apply the proceeds pursuant to the trusts of the late Earl's will, to which this Brazilian money was subject. *Brutton* got the bill discounted, and received the proceeds, which exceeded £5500. Of these proceeds £2114 was paid by *Brutton* to the credit of the joint account of himself and *Masterman* as trustees at the *National Bank;* and several payments were made on behalf of the Plaintiff; sometimes by cheques on the joint banking account of *Masterman* and *Brutton* as trustees; sometimes by cheques of the firm, and sometimes by cheques of *Brutton*. It appeared, however, that the payments made were far less in amount than the moneys received, and the object of the suit was to recover the balance, which had been appropriated by *Brutton* (since absconded), either from *Masterman* and

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Upfill, as members of the firm of solicitors by whom the arrangement of Plaintiff's affairs had been undertaken, and therefore, as was alleged, liable for the acts of their partner; or from *Masterman* as a trustee, who had, by his wilful neglect and default in allowing his co-trustee alone to receive the money, made himself liable for the loss.

The Plaintiff ceased to employ the Defendants as his solicitors towards the end of February, and they dissolved partnership on the 2nd of March, 1866, and some time afterwards delivered their bill of costs, made out in the name of Messrs. *Masterman, Upfill, & Brutton*, amounting to £1311 16*s.* 2*d.*

In order to fix the firm with liability to Plaintiff for the misapplied balance, various items in this bill of costs were relied on. In particular, in reference to the proceeds of the bill remitted from the *Brazils*, occurred the following charge:—

"1865.	£	*s.*	*d.*
"July 15. Having been requested by Lady *Dundonald* to attend her Ladyship at *Ryde* on the matters of this executorship; journey there accordingly, and discussing the position of the affairs of the late Earl, the distribution of the proceeds of bills for £5000 sent by your Lordship to Lady *Dundonald* to discharge the debts due from the late Earl's estate, to pay legacies specially bequeathed out of the money, and fully advising as to the course to be adopted, and taking instructions. "(Proportion of journey, the same being divided with the general business) engaged all day until late in the evening	5	5	0
"Paid railway and expenses	3	7	6"

And again, in reference to getting the bill discounted, was the following item under July 18:—

"And subsequently attending on the manager of the *National Bank*, discussing terms for discounting the Brazilian bill, engaged all the morning	2	2	0"

The Plaintiff had also been charged by the firm in their bill of costs, under the executorship heading and under other headings, with large sums for attendances and advice, and otherwise in

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reference to the application of the proceeds of the bill, without making any distinction between the £2114 and the residue of such proceeds.

In answer to the Plaintiff's applications for an account and payment of the balance, *Masterman* and *Upfill* insisted upon their right to compel payment of their bill of costs, and repudiated all liability, either as solicitors, or (as to *Masterman*) as trustee, for any of the Plaintiff's moneys received in the course of the employment charged for in the bill of costs, on the ground that the moneys were received by *Brutton* alone, and were so received by him on his sole account, and not on behalf of *Masterman* as his co-trustee, or *Masterman* and *Upfill* as his partners.

Under these circumstances the bill was filed against *Masterman, Upfill, & Brutton,* praying a declaration that all the Defendants were jointly and severally liable for all moneys of the Plaintiff (whether comprised in the trust deeds of the 2nd of November, 1864, and the 20th of March, 1865, or not) which, during the employment of the firm by the Plaintiff as his solicitors, came to the hands of the Defendants; and an account accordingly, and payment of the balance to Plaintiff; or, alternatively, an account of all moneys received by *Masterman* and *Brutton,* or either of them, as trustees, and that in taking such account *Masterman* might be charged with all the proceeds of the Brazilian bill, and any other of such moneys which were received by *Brutton,* and, but for *Masterman's* wilful neglect or default, might have come to the hands of *Masterman* and *Brutton* jointly; and that, as far as necessary for these purposes, the trusts of the trust deeds might be carried into execution under the direction of the Court, save so far as such trusts provided for any costs to become due to the firm, to which extent it was prayed that the deeds might be declared void, and set aside.

The bill also prayed an injunction against any proceedings against Plaintiff to recover the amount of the bill of costs.

The case raised by the answers was that the Plaintiff had exclusively consulted *Brutton,* and authorized him to act for him personally as his confidential agent, with the view of excluding *Masterman* and *Upfill,* from whom all knowledge of most of the transactions in relation to the Earl's affairs was kept back. In confirmation of this view, and as shewing that the Plaintiff did not

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intend that the firm should receive and dispose of the proceeds of the Brazilian bill, the Defendants relied on the conduct of the Plaintiff in giving the power of attorney to receive and dispose of the money remitted from the *Brazils* to *Brutton* and Lady *Dundonald,* and the absence of all information to the Defendants that the bill had been transmitted. It was also insisted that the firm never had any control over any funds belonging to Plaintiff, or in which he was interested, and consequently never left the disposal of any to *Brutton,* who was alone employed by the Plaintiff as his attorney and agent personally, and not as a member of the firm, and was alone liable to account to him.

Mr. *Amphlett,* Q.C., and Mr. *Bagshawe,* for the Plaintiffs:—

The money with which *Brutton* has absconded came into his hands in the course of transactions which were within the ordinary scope of the business of the firm as solicitors; and therefore the innocent members of the firm, who are precluded by their bills of costs from asserting that this matter was not within the ordinary scope of their business, are liable for the loss occasioned by the conduct of their partner: *Blair* v. *Bromley* (1); *Atkinson* v. *Macreth* (2); *St. Aubyn* v. *Smart* (3); *De Ribeyre* v. *Barclay* (4). The deeds by which *Masterman* and *Brutton* were appointed trustees for the purposes of realizing the Plaintiff's assets and satisfying his creditors, were mere machinery, and the money received under them was, in reality, received by the firm in their capacity of solicitors, so as to fix them with liability. With regard to setting aside the release, £250 is mentioned in the bill of costs as having been given to the Plaintiff for the expenses of his Brazilian journey; but we shew that that amount was not received, and therefore we are entitled to have the release set aside, and to have the account opened, with liberty to surcharge and falsify, especially where, as here, the release is between solicitor and client: *Lawless* v. *Mansfield* (5).

Mr. *Garth,* Q.C., and Mr. *Cottrell,* for the Defendant *Masterman*:—

The Plaintiff dealt throughout with *Brutton* in a personal and

(1) 2 Ph. 354.
(2) Law Rep. 2 Eq. 570.
(3) Law Rep. 3 Ch. 646.
(4) 23 Beav. 107.
(5) 1 Dr. & W. 557.

confidential capacity, and purposely excluded *Masterman* and *Upfill* from all participation in these transactions. He corresponded with him individually, and by sending the power of attorney to him and Lady *Dundonald* he put it in his power to receive the money without the knowledge of his partners; and having dealt with and trusted one partner solely, he cannot now make the others liable as if he had trusted the firm generally.

[The VICE-CHANCELLOR:—You have to get rid of the bill of costs. *Primâ facie* whatever the bill of costs represents as done by the firm was done by them.]

The charges were made up by an accountant, not from the books of the firm, but from stray papers and memorandums left by *Brutton,* and the firm can only be bound by the entries in the partnership books, in which most of these charges are not to be found. But in any case the firm, because they are entitled to charge and have charged for business done, are not to be made liable for moneys received by one of their members; it being no part of the ordinary business of a solicitor to receive money from his client for the purposes of investment or otherwise, so as to render the partners, without proof of authority from them, liable for the money so received: *Harman* v. *Johnson* (1); *Viney* v. *Chaplin* (2); *Bourdillon* v. *Roche* (3); *Bishop* v. *Countess of Jersey* (4). The relief prayed by the bill is inconsistent, and if the Plaintiff fails in making the Defendants liable as members of the firm he cannot obtain relief against *Masterman* in the character of trustee: *Coomer* v. *Bromley* (5); *Cawley* v. *Poole* (6); *Lindsay* v. *Lynch* (7).

Mr. *Druce,* Q.C., and Mr. *Freeman,* for *Upfill,* were stopped as to any liability in *Upfill,* in respect of moneys that found their way into the trust account.

On the main question they contended, that although it might have been the duty of *Masterman* and *Brutton* to see to the application of the Brazilian money, *Upfill* was in no way responsible, the money having been properly received by *Brutton* in the execution

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(1) 2 E. & B. 61.
(2) 2 De G. & J. 468. 4 Jur N.S. 619
(3) 27 L. J. (Ch.) 681.
(4) 2 Drew. 143. 18 Jur 765
(5) 5 De G. & Sm. 532.
(6) 1 H. & M. 50.
(7) 2 Sch. & Lef. 1.

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of a trust with which *Upfill* had nothing to do, and unless the receipt and application of money under such circumstances could be brought within the scope of the partnership business (against which *Viney* v. *Chaplin*, and the other cases cited, were conclusive authorities), it was not competent for one member of a firm, being also a trustee, to make his partners liable for misapplication of the money.

Mr. *Amphlett* replied on the question of setting aside the release.

March 24. Sir W. M. James, V.C.:—

This is a suit by the client of a firm of solicitors against the several members of that firm. The principal question is, whether two partners are liable to account for a very large sum of money received by a third partner who has absconded, and which was misapplied by him. There is little dispute as to the facts, which lie within a short compass. The Plaintiff was, in the year 1864, embarrassed by the pressing demands of several creditors. He had, however, very considerable unrealized assets. These comprised, and were to a great extent composed of, claims in respect of a *Trinidad* estate, and of his share and interest in large claims of his deceased father, the celebrated Lord *Cochrane*, against the Brazilian Government. He was desirous of rendering this property available for relieving himself from his embarrassments by distribution amongst all his creditors, and preventing its being attached and seized by the more importunate and impatient of the body, who had commenced, or threatened, legal proceedings. He was recommended to avail himself for this purpose of the services of an eminent firm of solicitors, to all of whom he had been previously a stranger. He accordingly applied to them, as such solicitors, to undertake the management and settlement of his affairs. They accepted the task. The extent to which their professional services were necessary and were given is shewn by the fact that their bill of costs from November, 1864, to February, 1866, amounts to no less a sum than £1311 16s. 2*d.* As is usual in such cases, one member of the firm had the almost exclusive conduct of the business of the client, and that member appears to have acquired his almost unbounded

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confidence. His acquaintance with him, however, began with his professional retainer, and although their constant, almost daily, intercourse naturally led to an intimacy amounting to friendship, it never appears to have lost its purely professional character. Their relations continued throughout those of client and solicitor, and, as far as appears, their interviews and their correspondence were treated as professional matters, for which the usual professional charges were made for the benefit of the firm, and duly recorded in the business memoranda and diaries kept by him as a member of the firm. As part of the arrangements made for the settlement of the Plaintiff's affairs he executed trust deeds vesting his *Trinidad* and Brazilian property in trustees upon trust for his creditors; and two of the members of the firm, Mr. *Masterman* and Mr. *Brutton*, were the trustees of those deeds, so as to keep the entire management and control in the firm itself. Having regard to the circumstances and the objects of the Plaintiff, the professional advice under which this was done was proper and right. It was not desirable that any third person should have any right to interfere with the client and his own solicitors. But it was because they were his solicitors, and it was because they were partners in the firm, and in that character only, that Mr. *Masterman* and Mr. *Brutton* were appointed to, and accepted, the office of trustees for the Plaintiff. Besides the arrangements as to the *Trinidad* and Brazilian funds, it became necessary to raise a sum of £1500 by way of mortgage on some property in *England*, to discharge the pressing claims of two creditors, *Faber* and *Keane*. This was raised, and the claims were paid. All the transactions connected with the raising and paying this money are charged in the bill of costs; the money itself actually passing through the hands of Mr. *Brutton* in the ordinary course of professional business, and, beyond all question, in his character of a member of the firm. The *Trinidad* matter was arranged. Very large sums in money and bills were received by Mr. *Brutton* under a written authority prepared by him and charged for in the bill of costs. The greater part of these moneys was paid to a creditor who had heavy paramount claims to the fund; and a sum as the balance, after satisfying this charge, was paid to the credit of the account of Messrs. *Masterman* and *Brutton* as the trustees of the trust deed. It was then considered necessary or advisable that the Plaintiff should proceed personally to the *Brazils* to prosecute the claims; and a sum of £250 was paid to him out of the trust moneys to defray the necessary expenses of his visit to that country. Before he left, he executed a power of attorney, not to the firm but, to Mr. *Brutton* and Lady *Dundonald*, as his joint attorneys, to act for him in his absence. Nothing was ever done under that power, but it is considered a material part of the *res gestæ*, as shewing, as is suggested, that the Plaintiff was dealing with Mr. *Brutton* not as a member of the firm, but in an independent capacity, and making him and another person, not a member of the firm, joint agents, to the exclusion of the firm as such. The Plaintiff's case as to this, however, is, that he acted in this, as throughout, under the professional advice of Mr. *Brutton*, and as part of the arrangements for the settlement of his affairs which had been and still remained confided to the firm. The charges for this power of attorney are contained in the bill of costs of the firm.

The visit of Lord *Dundonald* to *Brazil* was so far successful that he obtained a sum net, after many heavy payments in that country, of £5695 6*s*. The money, however, did not belong to him, but to the estate of his father, of which he was executor, and it was only the net balance which would remain after satisfying the claims of other members of the family that was applicable to the purposes of the trust deed. He sent a bill for the amount to this country, indorsed to Lady *Dundonald* and Mr. *Brutton*, and the bill was transmitted to Lady *Dundonald* herself. At the same time, he wrote letters to Mr. *Brutton*, containing directions as to the application of the fund; first, for satisfying the demands upon it in the executorship, and then for the application of it for the purposes of his own trust deeds. These letters are relied on by the Defendants as shewing that the Plaintiff relied personally on Mr. *Brutton*. They are, however, produced by the Defendants as documents in the possession of the firm as such. The business directed to be done was all connected with the original business of settling the claims of the Plaintiff's creditors, and necessarily required professional advice and assistance, and labour, which could not have been undertaken by Mr. *Brutton* except for the firm.

What took place thereupon is shewn by the bill of costs and the

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affidavit of Lady *Dundonald*. [His Honour referred to the entry in the bill of costs, under date the 15th of July, 1865, set out in the statement, and then referred to Lady *Dundonald's* affidavit, in which she stated that she understood that the proceeds of the bill for £5695 6*s*. were to be applied by the advice of *Brutton*, as the representative of his firm, in paying or compounding for the claims of her husband's late father, and that any surplus was to be applied by them with her husband's other funds in their hands in effecting a composition with her husband's other creditors; that she understood that Lord *Dundonald* had communicated to *Brutton*, his directions as to any particular details "which we wished attended to in the application of his money for the purposes aforesaid, but left the general management of the matter to *Brutton*, as the representative of the firm, and I was not competent to give, and did not give, directions or instructions on the subject. . . . . I was not authorized by my said husband to allow the said *Brutton* to receive or apply any of the proceeds of the said bill on his own responsibility, or otherwise than on the responsibility of his firm, and I did not do so in all my communications and transactions with him. He was, as I understood, acting on behalf and as the representative of his firm in their character of the general solicitors of my said husband, who had his affairs in their hands for the special purpose of settling with his creditors."]

Of course the advice given by Mr. *Brutton* was the advice of the firm. Under that advice the bill was given into the hands of Mr. *Brutton* for the purpose of satisfying the executorship obligations, and of handing the net surplus to the trustees. The bill of costs contains, in addition to the entry as to the visit to *Ryde*, the following entry:—

"And subsequently attending on the manager of the *National Bank*, discussing terms for discounting the Brazilian bill; engaged all the morning . . . £2 2 0"

As the result of that arrangement with the bank, Mr. *Brutton* obtained the proceeds of the bill which constitutes the sum now principally in question. The business of the executorship was professionally undertaken by the firm, and there is a very long and very heavy bill of costs of the firm for this professional business, principally in endeavouring to settle and to ascertain the amounts

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payable to the various claimants. A part of this sum was paid to the account of the trustees. The residue was, to a great extent, misappropriated by Mr. *Brutton*. The partners contend that Mr. *Brutton* alone, and not they, are answerable for the amount. The case of *Harman* v. *Johnson* (1), is relied on by the Defendants as an authority in their favour. [His Honour read the marginal note.] The second part of that case is a very important qualification of that which is supposed to be laid down in the first part. In truth, the mode in which the question arose was, that Lord *Campbell* in charging the jury had given, as he afterwards thought, too general a direction to them; intimating his opinion that money received by an attorney, a member of a firm, under any circumstances, was received by the firm through his hands. But it is important to observe that all the Judges expressly mention and decide, that money received by a partner for the purpose of being invested on a particular security is within the ordinary business of the firm, and as such the firm would be answerable for that which is done by one partner with respect to it. There is another case of *Viney* v. *Chaplin* (2), which is also thought to furnish some ground of defence, and was principally relied on for an expression of Lord Justice *Turner*, that it was no part of the ordinary duty of a solicitor to receive money belonging to his client, and that the deed of mortgage comes into his hands for a wholly different purpose. But this would hardly have arisen if it had not been a very common practice of attorneys to receive money on behalf of their clients on the completion of mortgage and purchase transactions; and what was decided there was, that an attorney as such has *not* as against his client authority to receive that client's money, but it does not touch the question whether when the authority is given to receive it, it is not a part of the business of one partner of the firm to receive it on behalf of the firm. The case on the other side which was referred to is *St. Aubyn* v. *Smart* (3). [His Honour read the head-note of that case.] Lord *Dundonald* was examined before me in order to elicit from him admissions of intimate relations with, and confidence in, Mr. *Brutton* personally, to the exclusion of the firm. In this examination Lord *Dundonald* adhered to the statements in his

(1) 2 E. & B. 61.

(2) 2 De G. & J. 468. 4 Jur. N.S. 619

(3) Law Rep. 3 Ch. 646.

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affidavit, that he throughout dealt with Mr. *Brutton*, not as a personal friend, not as a distinct and separate agent, but in that character in which alone he first established relations with him, viz., as the particular member of the firm by whom the personal account of the professional business which he required had been undertaken.

The question is, then, whether it is possible to treat the money so paid in the course of the professional business, which was undoubtedly the professional business of the firm, under professional advice, which was undoubtedly the advice of the firm, as paid otherwise than to the firm. I hold that it is not possible so to treat it, however hard it may be on the innocent partners. It is surely within the ordinary everyday practice of a firm of solicitors or attorneys to receive moneys from a client for the satisfying the demands of the creditors whom they are employed to arrange with. It is surely within the ordinary everyday practice of a firm of solicitors and attorneys to receive from a client, an executor, moneys—sometimes to pay the demands of Government, sometimes to pay legatees, and sometimes to pay into Court—in short, to receive money for any specific purpose connected with the professional business they have in hand; just as in *Harman* v. *Johnson* (1) the Court held that it was within the ordinary business of such a firm to receive moneys for the purpose of making a specific investment or mortgage. In truth, in this particular case the firm, through Mr. *Brutton*, had received the £1500, had received and paid the large amount received from the *Trinidad* property. If it was within the ordinary business of the firm so to receive moneys *cadit quæstio*, for what one partner does in the ordinary business of the firm is done by the firm. Of course, it is possible that a client may so have acted, may have so lent himself to one member of the firm as to preclude himself from enforcing such liability against the other members. But in this case, how is it possible to attribute any such acting to Lord *Dundonald?* He was in *Brazil*, and cannot be prejudicially affected by the fact that his wife indorsed the bill to the member of the firm through whom the firm advised and directed her what she ought to do with that bill. It is unfortunate, no doubt, for the other members of the firm; but that is a misfortune which arises from their original confidence in him. They held him out to the world as a person for whom they were responsible. All the profits arising from the transaction by him of the Plaintiff's business resulted to the firm; and the firm must bear the expense of any miscarriage by him, whether by negligence or dishonesty, in the conduct of the business.

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(1) 2 E. & B. 61.

That determines the main question as to the liability of the partners. There is a smaller item of money received from a Mr. *Stuckey*. The case seems to me to be exactly the same, with this additional fact against the firm, that is to say, that the document was actually endorsed there, the cheque was actually made payable to the order of the firm, and Mr. *Brutton* obtained it by using the firm's name in endorsing the cheque. It appears to me, therefore, that Plaintiff is entitled to a decree declaring that the Defendants are jointly liable for all the moneys of Plaintiff in the bill mentioned which came into the hands of Mr. *Brutton* as a member of the firm, and especially for the proceeds of the Brazilian bill of exchange and the moneys received from Mr. *Stuckey*, and there must be an account against them on the footing of that declaration.

There is another part of the case, connected with a comparatively small amount, arising from the trust deed. In the course of the argument I stopped the Defendants' counsel upon that. I considered that everything that had got into the hands of trustees ceased to be money for which the firm was liable. The trust deed was properly executed, two trustees were selected, and everything put into their hands. It appeared to me then, and I adhere to that view, that it was paid to them in their character of trustees, in respect of which the partner who was not a trustee had ceased to have any control or power. I propose, therefore, to declare that the partners are entitled to be discharged in respect of any of the moneys which were paid to, or to the account of, the trustees. There must be an account of receipts and payments by the two trustees—*Masterman* and *Brutton*—as trustees of the deed, in respect of all moneys that have come into their hands, the account to be taken in the ordinary mode in which trustees' accounts are taken. In connection with that part of the case there is a deed of release. The release is not in terms sought to be set aside, but an error is pointed out by the bill, and is verified by the evidence of the Plaintiff; and upon an examination of the deed there is clearly

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a mistake in it with respect to the amount mentioned. There is also this circumstance connected with the deed—that £300, a round sum, is taken for the professional costs. Having regard to these facts, and to the position of the parties—viz., that Lord *Dundonald* was the client, and that they were the solicitors (and the deed, in fact, was therefore prepared by them as the solicitors), and following the decision of Sir *E. Sugden* in *Lawless* v. *Mansfield* (1), I hold that the release is not conclusive against the Plaintiff; that it is to be treated as a settled account; and it will be sufficient in this case to give Plaintiff liberty to surcharge and falsify in respect of the account so settled. The Defendants must pay the costs of the suit.

Solicitors: Messrs. *Few & Co.*; Mr. *W. Masterman*; Mr. *Upfill*.

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March 20.

ARMSTRONG *v.* ARMSTRONG.

Will—Construction—Gift of Personalty to Wife absolutely "for the benefit of herself and Children"—Joint Tenancy—Reversionary Interest—Non-severance by marriage of female joint-tenant.

12 Eq 318
— 484, -7
7 Ch 255, -7
17 Ch D. 389, 390

Testator, by will, gave all his estate (which consisted wholly of personalty, or of real estate distributable as personalty) to his wife absolutely, "for the benefit of herself and children;" and appointed her executrix of his will. He left his wife and six children surviving. The widow proved the will, and died. During her lifetime one of the children, a daughter, married and died:—

Held, that the children took as joint tenants, and, *semble*, that the wife took only an estate for life:

Held, further, that the daughter did not, by her marriage, sever the joint tenancy.

THIS was a bill praying for a declaration of the true construction of the will of *John Armstrong*, late of *Singapore*, who died in October, 1852, having made his will, dated the 5th of August, 1850, in the following terms:—

"I do hereby devise and bequeath unto my wife *Eliza*, her heirs, executors, administrators, and assigns, absolutely for ever all my real and personal estate whatsoever and wheresoever, or what nature, kind, or quality soever the same may be, and which I may be possessed of, interested in, or entitled to, for the benefit of herself and children. I do also hereby constitute and appoint my said wife sole executrix of this my last will and testament; and in the event of her death during my lifetime, then and in such case I nominate and appoint *Thomas Owen Crane* and *Gilbert Bain* to be my executors, requesting that they will kindly act in the winding up of my affairs for and on account of my children, to whom I bequeath all such property as I may die possessed of, as above stated: say, two-thirds of all such property to be divided amongst the girls, and the other third amongst the boys."

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(1) 1 Dr. & W. 557.

The testator left his widow surviving, who proved his will, and died on the 15th of June, 1867.

He also left three sons and three daughters. Of these, *John William* was indebted to the testator's estate more than his share under it could amount to, whatever that might be; *Farleigh*, another son, who was the legal personal representative of his mother and father, was a Defendant; *Mary Ann* married the Defendant *William Mactaggart* and died; and the remaining three children, *George*, *Isabel Jane*, wife of the Plaintiff, *Samuel Gilfillan*, and *Harriet Eliza*, were Plaintiffs.

The property was all personalty, or distributable as such; and the questions were: 1. Whether the widow took absolutely; 2. Whether the widow and children took in equal shares, or whether the widow took for life, with remainder to her children—a question which, since the widow's death, was only of importance as regarded the apportionment in account of shares of past income; 3. Whether the children took as joint tenants, or as tenants in common; and 4. Whether, if there were a joint tenancy, it had been severed by Mrs. *Mactaggart's* marriage.

Mr. *Wickens*, for the Plaintiffs:—

The Plaintiffs claim as joint tenants, to the exclusion of the Defendant *Mactaggart*, who represents the deceased daughter.

The dominant part of the will is that in which the testator gives all his real and personal estate to his wife *Eliza*, followed by the words "for the benefit of herself and children." Ordinarily, no

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doubt, these words would imply a joint tenancy amongst the widow and the six children; but a series of cases will be found, amongst which are *Crawford* v. *Trotter* (1); *Jeffery* v. *Honywood* (2); and *Morse* v. *Morse* (3), all collected in *Jarman* on Wills (4), in which expressions of this kind have been construed to mean a gift to the widow for life, with remainder to her children. If that be the true construction here, it follows no less that the children must take as joint tenants.

If the other construction be adopted, that the wife and children all take together, the widow being dead, the result is substantially the same as far as the Plaintiffs are concerned, since they all take as joint tenants, except that there will be some difference as to the distribution of the past income.

It may be said that Mrs. *Mactaggart* severed the joint tenancy by her marriage; but *May* v. *Hook* (5) is an authority to the contrary.

Mr. *Millar*, for the Defendant *Farleigh Armstrong*:—

As representative of the estate of his late mother, the Defendant supports, on the first point, the contention of Mr. *Wickens*, that Mrs. *Armstrong* took a life interest in this fund.

But he is further entitled to contend that the widow in this instance took absolutely; the indication of the testator's intention to benefit his children being too slight to amount to a trust.

This case is to be distinguished from *Longmore* v. *Elcum* (6), *Woods* v. *Woods* (7), and *Gilbert* v. *Bennett* (8), where the income was to be applied by the widow for the education and maintenance (or to that effect) of the children; and also from *Raikes* v. *Ward* (9), and *Crockett* v. *Crockett* (10), where the direction was that the fund was to be at the disposal of the wife for the benefit of herself and children.

It rather falls within such authorities as *Jones* v. *Greatwood* (11), and *Hart* v. *Tribe*, as to the £100 legacy (12).

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(1) 4 Madd. 361.
(2) Ibid. 398.
(3) 2 Sim. 485.
(4) 3rd Ed. vol. ii. pp. 373-4.
(5) Co. Litt. 246 a, Butler's note (184).
(6) 2 Y. & C. Ch. 363.
(7) 1 My. & Cr. 401.
(8) 10 Sim. 371.
(9) 1 Hare, 445.
(10) 2 Ph. 553.
(11) 16 Beav. 527.
(12) 18 Ibid. 215.

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"The current of decisions has of late years," says Mr. *Lewin* (1), "set against the doctrine of converting the devisee or legatee into a trustee;" and of this *Byne* v. *Blackburn* (2) is a strong instance.

Mr. *Winterbotham*, for the Defendant *Mactaggart*:—

Our contention is, that the gift was a gift to the widow for life, with vested remainders to her six children as tenants in common.

The result of the cases seems to be, that where there is a direct simple gift to *A.* and her children, the Courts hold this a gift to *A.* for life, remainder to the children: *Crawford* v. *Trotter* (3); *Audsley* v. *Horn* (4); *Ward* v. *Grey* (5).

Where there is no direct gift to the children, but a gift (as here) to *A.* absolutely, or to a trustee absolutely, "for the benefit of *A.* and her children," then, if there be any words implying a settlement, as that *A.* shall enjoy for her separate use, or other special circumstances, the Court will hold, as above, a gift to *A.* for life, with remainder to the children: *Froggatt* v. *Wardell* (6); *Jeffery* v. *De Vitre* (7); *Morse* v. *Morse* (8).

But, if in the case last stated, there be (as here) no words implying settlement, and no special circumstances, the Court construes *A.*, or the trustee, as the case may be, a trustee for *A.* and her children equally as tenants in common: *Bibby* v. *Thompson* (9).

It is otherwise where (as not in this instance) a large discretionary power is given to *A.*, as occurred in *Crockett* v. *Crockett* (10); *Raikes* v. *Ward* (11).

The leaning of the Courts is towards a tenancy in common: *Re White's Trusts* (12); *In re Phene's Trusts* (13).

That Mrs. *Mactaggart's* marriage did operate as a severance of the joint tenancy, the fund being not real estate, as in *May* v. *Hook* (14), appears from *Bracebridge* v. *Cook* (15).

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(1) Lewin on Trusts, 5th Ed. p. 110.
(2) 26 Beav. 41. 4 Jur NS 803
(3) 4 Madd. 361.
(4) 26 Beav. 195. 4 Jur NS 1267
(5) Ibid. 485. 5 Jur NS 948
(6) 3 De G. & Sm. 685.
(7) 24 Beav. 296.
(8) 2 Sim. 485.
(9) 32 Beav. 646.
(10) 2 Ph. 553; overruling the decision, 1 Hare, 451.
(11) 1 Hare, 445.
(12) Joh. 656.
(13) Law Rep. 5 Eq. 346.
(14) Co. Litt. 246 a, Butler's Note (184).
(15) Plowd. 416.

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Mr. *Wickens*, at the close of the argument, in answer to a question by the Court, admitted that it was not intended to press the question as to the adjustment of the past account; and in the result the second question remained undecided.

Sir W. M. James, V.C.:—

I think in this case there is no ground at all for holding the children to be tenants in common.

There are no words, and there is no context importing words, of severance, as the Master of the Rolls thought there was in the case of *In re Phene's Trusts* (1). In that will the gift was to executors, upon trust for the benefit of *M.* for life, and after her death "in trust for the benefit of her children, to do that which they, my executors, may think most to their advantage." Those were words which the Master of the Rolls thought gave the executors a power of dividing the property; and the Court resolved to do that which the executors, had they lived, would have had the power of doing.

That is the only case which seems to me to be any authority for holding that these children take as tenants in common.

If they take as joint tenants, it becomes immaterial to consider whether the gift was a gift to the wife for life, with remainder to the children; or whether it was a gift to the wife and children equally. I confess the strong inclination of my opinion would be to declare it a gift to the wife for life, with remainder to the children; but I do not think it necessary to determine that question.

The only remaining point is, whether the joint tenancy was severed by the marriage of one of the daughters? On this point the authority that was cited simply deals with the case of a chattel personal in possession; but just as it has been held that marriage will not sever a wife's joint tenancy in a chattel real, so it would seem that marriage will not be a severance of joint tenancy in a *chose en action* which the husband could not have reduced into possession during the coverture.

There will be a declaration that, in the events which have happened, the surviving children are entitled to the testator's estate equally as joint tenants; the costs of all parties, as between solicitor and client, to come out of the fund.

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(1) Law Rep. 5 Eq. 346.

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Solicitors: Messrs. *Woollacott & Leonard.*

FEILDEN *v.* SLATER.

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1869
March 1.

Grantor and Grantee—Lease—Notice of Covenants in Original Deed of Grant—Sale of Spirituous Liquors—Injunction—Practice—~~Answer~~—Co-Defendants.

A lessee is bound to inquire into, and is fixed with notice of, all covenants into which his lessor has entered in respect of the land.

In 1854, a dwelling-house and shop were conveyed by the Plaintiff to the Defendant *A.* in fee, in consideration of the payment by *A.* to the Plaintiff of a perpetual yearly rent-charge; and the conveyance contained a covenant by *A.*, his heirs, executors, and administrators, with the Plaintiff, his heirs and assigns, that he and they would not use or occupy, or permit to be used or occupied, the building "as an inn, public-house, or tap-room, or for the sale of spirituous liquors, or ale or beer." In 1857, the Defendant *B.* became tenant from year to year of the house, using and occupying it for the business of a grocer. In 1862, *A.* demised the house and shop to *B.* for twenty-one years at a yearly rent; the only restrictive covenant being a covenant by *B.* that "no offensive business or occupation or nuisance shall be carried on or committed on the said premises, and that the same shall be used as a dwelling-house and shop only." In 1866, *B.*, as the agent of a firm of *London* wine merchants, began, in the course of his business as a grocer, to sell on the premises wine and spirits, but in bottle only.

9 Eq 27,
674-6-7
680,
10 Ch D 755
759,
11 Ch D 275
276
13 Ch D 326
17 Ch D 354
19 Ch D 261

On bill for an injunction against *A.* and *B.*, it was found, as the result of the evidence, that *B.* had no knowledge of the covenant in the original deed:—

Held, notwithstanding, that he was put upon inquiry, and was fixed with constructive notice of the covenant:

Held, further, that the words, "for the sale of spirituous liquors," did not prevent the sale of wine, but extended to the sale of spirituous liquors in bottle; and injunction granted accordingly.

Bill dismissed against *A.* with costs.

A Plaintiff cannot, without giving notice, read the ~~answer~~ of a Defendant evidence against a co-Defendant.

CAUSE.

By an indenture, dated the 25th of April, 1854, a plot of land on the west side of the *New Market Place, Blackburn, Lancashire,*

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with six messuages, dwelling-houses, or shops, then lately erected thereon, were granted by the Plaintiff, *Joseph Feilden*, and another, to the Defendant, *William Boocock Slater*, and three other persons, and their heirs, to the use that a yearly rent-charge of £40, clear of all deductions, might for ever thereafter issue out of the said plot of land and the buildings for the time being standing thereon, and be received and taken by the grantors, their heirs and assigns, in equal half-yearly portions; and as to the hereditaments, to the use of the several grantees and their heirs in fourth shares. By the same deed *Slater* and his co-grantees jointly and severally, for their heirs, executors, and administrators, covenanted with the grantors, their heirs and assigns, amongst other things, as follows: that they would not "use or occupy, or permit to be used or occupied, any of such buildings as fronted the said *New Market Place* as an inn, public-house, or tap-room, or for the sale of spirituous liquors, or ale or beer."

In 1857, the Defendant *James Sefton* became yearly tenant of one of the houses, called No. 51, *Albert Buildings*, where he carried on the business of a grocer and cheesemonger, and this yearly tenancy was continued until the granting of the lease below-mentioned.

In the year 1858, the Defendant *Slater* became the sole owner of the house No. 51, *Albert Buildings*, subject to the rent-charge of £40 issuing out of the entirety of the premises.

In the year 1859 the Plaintiff became entitled to the whole of the rent-charge.

By an indenture of lease, dated the 1st of November, 1862, and made between *Slater* of the one part, and *Sefton* of the other part, in consideration of the yearly rent of £80, increased after two years to £85, the house and shop No. 51, *Albert Buildings*, were demised by *Slater* to *Sefton*, his executors, administrators, and assigns, for a term of twenty-one years from the 12th of November, 1862. In this deed was contained a covenant on the part of the lessee in these terms: "that no offensive business or occupation or nuisance shall be carried on or committed in the said premises, and that the same shall be used as a dwelling-house and shop only."

In November or December, 1865, *Sefton*, who was still carrying on the same business, was appointed an agent for the sale of the wines and spirituous liquors of *W. & A. Gilbey*, a firm of *London* wine merchants; and shortly before March, 1866, he began to sell *Gilbey's* wines and spirits, but no others. He did not sell wines or spirits for consumption on the premises; nor in any less quantity than a single reputed quart bottle.

Early in March, 1866, *Thomas Howard*, an agent of the Plaintiff, called upon *Sefton*. As to what passed there was a slight conflict of evidence. *Howard* said *Sefton* told him he was selling the wine and spirits with the sanction of *Slater*. *Sefton*, on the other hand, said that *Howard* asked him whether he was aware he ought not to sell wines and spirits, and he told *Howard* that he was not so aware, and that his lease did not prohibit him.

On the 9th of March, 1866, *Howard* wrote to *Slater*, calling his attention to "a serious infringement" of the covenant contained in the deed of the 25th of April, 1854. In this letter the writer said: "I trust what he (*Sefton*) told me is not correct as to your having consented to his obtaining a license; for you are no doubt aware that this is one of the covenants which Mr. *Feilden* has been called upon strictly to enforce."

This letter not having been answered, the agent wrote again to *Slater*, saying he had been subjected to considerable annoyance by being charged with favouritism in overlooking this breach of covenant, whereas legal proceedings had been at once taken against other persons.

In April, 1866, *Slater* had an interview with *Howard*, and said he would endeavour to induce *Sefton* to discontinue the sale of wine and spirits; and after more correspondence and interviews, *Slater* at length, on the 3rd of March, 1868, stated to *Howard* that he had used his utmost endeavours to induce *Sefton* to discontinue the sale, but without success.

This bill was filed on the 14th of March, charging (par. 23) that "the aforesaid offering for sale and selling by the Defendant *James Sefton*, of wines and spirituous liquors at his said shop is a breach of the covenant contained in the indenture of the 25th of April, 1854;" and praying for an injunction to restrain the Defendants from using or occupying, or permitting to be used or occupied, the house and shop "as an inn, public-house, or tap-room, or for the sale of spirituous liquors, or ale or beer;" and that the amount of damages might be ascertained.

Sefton, by his answer, dated the 22nd of May, speaking of the lease, said: "The said indenture was prepared by Messrs. *Leonard & William Wilkinson*, of *Blackburn*, the solicitors of *Slater*, and I had no solicitor in the matter. I did not know, nor had I any notice, that *Slater* was under any such restrictive covenant as that stated in the bill. In fact, I did not know, and I had no idea, that *Slater* was himself only a lessee of the premises." He further said: "In the course of the last few years it has become a common practice for grocers to sell wine and spirits on the same premises as those on which they carry on their ordinary business." He admitted that he was still carrying on the sale.

On the 9th of July the bill was amended, charging that "prior to the granting of the lease, the Defendant *Sefton* was informed of the covenant contained in the deed of the 25th of April, 1854, and that he could not occupy the house for the sale of spirituous liquors;" and on the 30th of July, *Sefton*, in answer to the amended bill, denied the statement explicitly, and said: "When I became tenant of the said house, and for three or four years afterwards, I had no knowledge that my occupation of it was fettered further than by the covenant" (referring to the covenant in the lease).

On behalf of the Defendant *Slater*, *Marmaduke Callis*, a clerk of Messrs. *Wilkinson* of *Blackburn*, *Slater's* solicitors, deposed that he prepared the draft lease; and that on the 18th of September, 1862, *Sefton* called at the office to settle the draft. *Sefton* employed no other solicitors. "I," deposed the witness, "read over the draft lease to him, and the only clauses on which he raised any question were on the covenant by him that no offensive business, or occupation, or nuisance, should be carried on or committed on the said premises, and that the same should be used as a dwelling-house and shop only, and on the covenant against assigning or underletting. And he then asked me what was the effect of those covenants, and I informed him that he could not use the premises for any other purposes than as a dwelling-house and shop, and that he could not occupy them, or permit the same to be used as an inn, public-house, or tap-room; or for the sale of spirituous liquors, or ale or beer; and that he could not assign, or underlet the premises without the consent of the said *W. B. Slater;* and the said *J. Sefton* replied that he wanted the premises for the purpose only of carrying on

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his own business of a grocer, which he had carried on there for several years, and did not want them for any other purpose."

Mr. *Kay*, Q.C., and Mr. *Renshaw* for the Plaintiff:—

The injunction we ask for does not extend to wine. We seek only to restrain the sale of spirituous liquors.

The Defendant *Sefton's* knowledge of the existence and terms of the covenant is proved by the evidence of the solicitors' clerk.

Mr. *Druce*, Q.C., and Mr. *Simmonds*, for the Defendant *Sefton*, objected to this evidence being read against *Sefton*. The evidence of one Defendant cannot, without notice, be read against a co-Defendant.

Mr. *Renshaw, contrà*, cited *Lord* v. *Colvin* (1); *Sturgis* v. *Morse* (2). Proof of express notice, however, is not necessary; inasmuch as it has been held that every underlessee is bound to inquire—in other words, has constructive notice of all the restrictive covenants in the original lease: *Wilson* v. *Hart* (3); *Clements* v. *Welles* (4); *Parker* v. *Whyte* (5).

In *Harms* v. *Parsons* (6) a covenant not to carry on the trade or business of a horse hair manufacturer was held to prevent the covenantor from dealing in manufactured horse hair.

Mr. *Amphlett*, Q.C., and Mr. *Rowcliffe*, for the Defendant *Slater*:—

We have been unnecessarily made parties. In *Clements* v. *Welles* the intermediate lessor was dismissed with costs.

Mr. *Druce*, Q.C., and Mr. *Simmonds*, for the Defendant *Sefton*:—

The bill, as originally framed, sought to restrain the sale of wine as well as of spirits, as appears from the 23rd paragraph, although the notice of motion does not go so far.

The case resembles *Pease* v. *Coats* (7), where the Lord Chancellor, then Vice-Chancellor *Wood*, held that a covenant not to use a building as a "public-house," did not prevent the covenantor from taking out a license to sell beer not to be drunk on the premises. Here the words "For the sale of spirituous liquors" are merely an

(1) 3 Drew. 222.

(2) 26 Beav. 562.

(3) 2 H. & M. 551; Law Rep. 1 Ch. 463. 11 Jur N S 735; 12 ib. 460

(4) Law Rep. 1 Eq. 200. 35 Beav 513; 11 Jur N S 99 &

(5) 1 H. & M. 167.

(6) 32 Beav. 328. 9 Jur N S 145.

(7) Law Rep. 2 Eq. 688. 12 Jur N S 684

amplification of the term "public-house," and are not meant to preclude the sale of spirits in bottle.

The evidence of *Slater* cannot be read against us.

The VICE-CHANCELLOR said he certainly should not allow it to be so used without giving the Defendant *Sefton* an opportunity of meeting it.

Mr. *Druce*:—Taking even the evidence of the clerk as it stands, it amounts to this: *Sefton* asked what was the effect of the covenants (not in the original deed, of the existence of any covenants in which he had not an inkling, but) in his own lease. If the clerk gave such an answer as he says he gave, it would have been incorrect and absurd, for no one pretends there is any such covenant as this against the sale of spirituous liquors in the lease. The evidence is an afterthought, and must be rejected.

Then, is the Plaintiff entitled to any relief by way of injunction? It is admitted that he could not maintain an action at law, in other words, that the covenant does not run with the land—hence *Bristow* v. *Wood* (1) has direct application.

In *Wilson* v. *Hart* (2) the Defendant admitted he knew there was some restriction, and was consequently held to be put on inquiry as to what it was; as is clearly explained by the Lord-Chancellor, then Vice-Chancellor *Wood*, in the same case (3). *Clements* v. *Welles* (4), again, turned wholly upon notice; following in that respect *Tulk* v. *Moxhay* (5). The distinction here is, that *Sefton* had no knowledge of any covenant or any restriction whatever.

Mr. *Kay*, in reply:—

Pease v. *Coats* (6) is a case essentially different from this.

It may be admitted that this covenant does not run with the land; but the case is really governed by *Wilson* v. *Hart*.

Slater is equally in default with *Sefton*. He covenanted that he would not permit the thing to be done, and yet omitted to take a similar covenant from *Sefton*. In *Hodson* v. *Coppard* (7) a Defendant, having purchased from the Plaintiff in fee simple, with a restriction against certain trades, permitted one of his tenants to carry on one of the trades. Upon bill for an injunction, the Defendant, by his answer, insisted that the suit ought to have been brought against the tenant. He was, nevertheless, restrained.

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(1) 1 Coll. 480.
(2) 2 H. & M. 551; Law Rep. 1 Ch. 463. 2/
H & M (3) 2 ~~Ibid.~~ 556, 8. 11 Jur N.S. 736
(4) Law Rep. 1 Eq. 200. 35 Beav
(5) 2 Ph. 774. 513. 11 Jur N.S.
(6) Law Rep. 2 Eq. 688. 12 Jur N.S.
(7) 29 Beav. 4. 6 Jur N.S. 11,

2/ 11 Jur N.S. 735 12 L.T. 460

SIR W. M. JAMES, V.C., after stating the facts of the case, and the defence set up by *Sefton*, continued:—

If it had been necessary for the Plaintiff to make out that the Defendant *Sefton* received notice of the covenant, I should have held that *Sefton* had no actual and no constructive notice of the covenant, except so far as constructive notice may be expressive of the state of mind of a man who did not know of the existence of a thing because he did not inquire.

I do not think a Plaintiff can, without notice, use the affidavit of one Defendant against a co-Defendant; nor do I think it was intended to be so held by Vice-Chancellor *Kindersley* in the case of *Lord* v. *Colvin* (1), because the whole of His Honour's reasoning is concluded by this observation (2): "Under the present practice, when witnesses are examined before the Examiner, all parties are, or at least may be, present; and all parties know what the depositions of the witnesses are, as they are given." Whether that be strictly accurate or not, I will not stop to inquire, but the meaning is plain—that all parties have an opportunity, at any rate, of attending the examination; and therefore the evidence of one may be used against any other.

But I am certainly not prepared to hold, until I am so instructed by a Court of higher authority, that a Plaintiff may, without giving notice, use the evidence of one of the Defendants against his co-Defendant. Such a doctrine appears to me to be entirely inconsistent with the whole course of our practice in cases where no issues are raised between co-Defendants in a suit.

But it is not, as it seems to me, necessary for the Plaintiff, in this case, to prove actual notice of the covenant. In this respect, I feel myself bound by the decision of *Wilson* v. *Hart* (3) before the Lords Justices. The present Lord Chancellor appears to have proceeded on the broad ground that there was an actual knowledge

(1) 3 Drew. 222. (2) 3 Drew. 225.
(3) Law Rep. 1 Ch. 463. 12 Jur N.S. 460

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of some restriction, as to which inquiry would have led to actual knowledge of the covenant. But the Lords Justices went on to say, that if a man will take an underlease he must be bound by all the covenants in the original lease. And although, no doubt, that was a strong instance of legislative action on the part of the Judges of this Court, one can easily see the immense amount of mischief which was intended to be obviated by it. If it were not so, any tenant from year to year might do as he pleased with the property. Whatever might be the covenants in the original lease, he might say he knew nothing of them, and then would be held not bound by the covenant, and might so set the original lessor at defiance.

9 Eq 605

Then comes the question of what the real meaning of this covenant is; and it has been pressed upon me that I can put some limit upon the meaning of the words "for the sale of spirituous liquors," and read them as meaning something *ejusdem generis* with "public-house," "gin-shop," or something of that sort; in other words, that the covenant cannot apply to the case of a man who sells spirituous liquors in bottle in the course of his business as a wine merchant and grocer. But I think it impossible to cut down the words of the covenant in this way. The words "for the sale of spirituous liquors" are in addition to the restriction against using the building "as an inn, public-house, or tap-room;" and they do prohibit the sale of spirituous liquors. It is not for this Court to decide the exact amount—whether a quart or a pint bottle, or a glass—a sale of which would constitute a breach of the agreement. It has been suggested that on this principle a chemist might be held guilty of a breach of a covenant if he were, in the course of his business, to sell something of the same sort as "spirituous liquors." But this Defendant is selling spirituous liquors, and selling them as such; and I cannot say that if this Defendant had been allowed to sell spirituous liquors in bottle, some other tenant might not come forward and claim to be allowed to sell them in a glass. That being so, I think it would not be safe to put any construction upon the covenant inconsistent with the plain and ordinary meaning of the words used. I think that the Defendant is bound not to sell spirituous liquors in any form in any building fronting the *New Market Place, Blackburn.*

Then it was said that no damage has been shewn; but I do not think it necessary to go into that. The Plaintiff himself is the best judge of what is advantageous for his property; and the evidence at least shews that other persons who are under like covenants have complained of the favouritism shewn by the Plaintiff's agent in overlooking this breach of covenant by the Defendant.

Then it has been suggested that the Plaintiff's delay is material; and it certainly did appear to me at first sight that the delay had been considerable. However, the Defendant had clear notice that the Plaintiff complained of the breach of covenant long before the filing of the bill; and there is no evidence of the Defendant having been in any way prejudiced by delay on the part of the Plaintiff. He first began to sell in 1866; the question was then first raised; and he has been selling as agent for the *London* firm ever since.

The Plaintiff, therefore, is entitled to an injunction to restrain the Defendant *Sefton* from using this house and shop for the sale of "spirituous liquors." I do not mean to restrain him from selling wine. He must also pay the costs of the suit.

As to the Defendant *Slater*, I am not satisfied that there was any ground for making him a party to the suit. His real position was known to the Plaintiff. He has no power of restraining *Sefton*, and must have failed in any attempt to do so, because *Sefton* was no party to the original covenant. *Slater* never did contend, by bill, answer, or otherwise, that *Sefton* was not in the wrong; and it seems to me he did all that lay in his power to induce *Sefton* to discontinue. The bill as against him must be dismissed with costs.

There will be a declaration that the Court is of opinion that the sale of spirituous liquors is a breach of the covenant. Let the Defendant be restrained from using the dwelling-house and shop for that purpose; but let the injunction be suspended for six weeks to enable the Defendant to sell off his remaining stock of spirits now on the premises.

Solicitors for the Plaintiff: Messrs. *Shaw & Tremellen*, agents for Mr. *John Pickop, Blackburn.*

Solicitors for the Defendant *Slater:* Messrs. *Gregory, Rowcliffe, & Rawle*, agents for Messrs. *L. & W. Wilkinson, Blackburn.*

Solicitor for the Defendant *Sefton:* Mr. *James Price*, agent for Mr. *Henry Saward, Blackburn.*

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Jan. 30;
Feb. 1.

9 Eq. 380
10 Eq. 224-6.
WN 75 / [illegible]
3 Ch. D. 557
6 Ch. D. 246
17 Ch. D. 837.

In re WILMOTT'S TRUSTS.

Settlement—Construction—Vested Interest—"Due and payable"—Gift over.

By a marriage settlement trustees were directed to hold a sum of stock, and the income, after the death of the survivor of husband and wife, unto and amongst a child (*J.*) of the husband by a former marriage, and all the children of the then intended marriage, in equal shares, and in case either or any of them should happen to be dead leaving issue, unto the issue of such one or more which should be then dead, equally to be divided amongst them or their issue respectively, to each being a son at twenty-one, and to each being a daughter at twenty-one or marriage; and until their respective shares should become "payable as aforesaid," upon trusts as to income for maintenance and education. In case *J.* or either or any of such children of the marriage should die without issue before his, her, or their share should become "due and payable," the share was to be paid and divided unto and amongst the survivors and survivor, and the issue of any one or more of them who might happen to be dead leaving issue, in equal shares, in manner aforesaid, and when and as his, her, or their original or proper share or shares should become "due and payable." In case at the time of the decease of the survivor of husband and wife there should be neither *J.*, nor any child or children of the marriage, nor any issue of *J.*, or of such child or children, living, or if there should be any then living, if all of them should die before his, her, or their share or shares were "payable, then" there was a gift over. In case the trustees should see it necessary or requisite for a child or the issue of a child to have his, her, or their share or shares paid, assigned, or transferred to him, her, or them before the expiration of "the respective times hereinbefore limited for the payment and division thereof respectively," they were empowered to pay or assign and transfer the same accordingly.

J. died without leaving issue in the lifetime of the tenant for life:—

Held, that the provision for the issue of a deceased child relieved the Court from the necessity of applying the rule in *Emperor* v. *Rolfe* (1); and that, upon the construction of the whole settlement, the share of *J.* was divested, and went over to the survivors.

Observations on *Mocatta* v. *Lindo* (2).

PETITION.

By a marriage settlement dated the 12th of August, 1807, and expressed to be made between *Susannah Pigram* of the first part, *James Wilmott* of the second part, and *William Pigram* the elder, *William Pigram* the younger, *William Westall*, *Thomas Westall*, and *Charles Wilmott* of the third part, the trustees were directed from and after the marriage, to stand possessed of a sum of stock upon trust to pay the income to *James Wilmott*, the intended husband, for life, then to *Susannah Pigram*, the intended wife, for life, and after the decease of the survivor upon trust to "assign, transfer, and dispose of" the fund and income "unto and amongst *James William Wilmott*, the only son of the said *James Wilmott* by *Judith Ann*, his late wife deceased, and all and every the child and children of the said *James Wilmott* by the said *Susannah Pigram*, and the issue of such of them respectively, in case any of them shall be then dead leaving issue," as the husband and wife should jointly appoint; and in default (which happened) of such appointment, then "unto and amongst" the said *J. W. Wilmott* and all and every the children of the marriage in equal shares; "and in case either or any of them, the said *J. W. Wilmott*, or the child or children of the said intended marriage, shall happen to be dead leaving issue, unto the issue of such one or more which shall be then dead (but the child or children of the deceased shall be entitled only to the share which his, her, or their father or mother would have been entitled unto if living) equally to be divided amongst the said *J. W. Wilmott* and such child and children of the said intended marriage or their issue respectively, to each being a son at his age of twenty-one years, and to each being a daughter at her age of twenty-one years or day of marriage, which shall first happen; and in the meantime, until their respective shares and proportions shall become payable as aforesaid," upon trust to pay the income towards their maintenance and education, as the trustees should think fit; "and in case the said *J. W. Wilmott*, or either or any of such children of the said intended marriage, shall happen to depart this life without issue before his, her, or their share or shares of and in the said trust moneys shall become due and payable," upon trust "to pay and divide such share or shares of him, her, or them so dying without issue unto and amongst the survivors and survivor of them the said *J. W. Wilmott* and the children of the said intended marriage, and the issue of any one or more of them who may happen to be dead leaving issue, in equal shares and proportions, in manner aforesaid, and when and as his, her, or their original or proper share or shares shall become due and payable; and in case at the time of the decease of the survivor of them the said *J. Wilmott* and *S. Pigram* there shall be neither the said *J. W. Wilmott,* nor any child or children of the said intended marriage, nor any issue of the said *J. W. Wilmott,* or of such child or children, living, or if there shall be the said *J. W. Wilmott,* or any such child or children of the said intended marriage, or any issue of the said *J. W. Wilmott,* or of such child or children, then living, yet if all of them shall die before his, her, or their share or respective shares are payable, then" that the trustees should stand possessed of the said fund and the income thereof upon trust for the executors and administrators of the said *James Wilmott,* or other the person or persons legally entitled to have and receive the same; provided that in case the trustees should see it necessary or requisite "for any or either of such child or children aforesaid, or the issue of any one or more of such child or children, to have his, her, or their share or shares" of the principal sum, and the income thereof, or any part thereof, "paid, assigned, or transferred unto them, or otherwise for their use and benefit, before the expiration of the respective times hereinbefore limited for the payment and division thereof respectively," the trustees should pay or assign and transfer the same accordingly.

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(1) 1 Ves. Sen. 209.

(2) 9 Sim. 56.

James Wilmott died in 1818. There were four children of the marriage, *Susannah, Maria, Eliza,* and *Charles. Susannah,* who was born in 1808, married *John Prior,* and died on the 10th of January, 1843, leaving two children, *William Sangster,* and *John,* a Petitioner. *William Sangster Prior* died in 1857, leaving a widow, *Caroline,* afterwards *Caroline Cole,* who became his administratrix.

Maria, who was born in 1810, married, in 1830, *Edward Staveley Briggs,* and her share was put into settlement.

Eliza, who was born after *Maria,* died before July, 1815, an infant and unmarried.

Charles, who was born in July, 1815, was a Petitioner.

J. W. Wilmott died without leaving issue in March, 1867; but leaving a widow, *Susannah,* who became his administratrix.

In October, 1867, *Susannah,* formerly *Pigram,* afterwards *Wilmott,* the surviving tenant for life (who had since married *Thomas Allen*) died; and the fund fell into possession.

The present Petition was presented by *Charles Wilmott* and *John Prior;* the Respondents being Mrs. *Briggs*' trustee, Mrs. *Briggs,* now a widow, the executrix of *J. W. Wilmott*, the administratrix of *W. S. Prior* and her husband, and the trustees of the marriage settlement; and the question was, whether *J. W. Wilmott's* original and accrued share (now one-fourth) passed to his executrix, or whether it accrued in thirds to the children of *Susannah*, to *Maria*, and to *Charles*, the three children of the marriage of *James* and *Susannah Wilmott* who attained twenty-one.

A sum of £501 1*s*. 3*d*. Bank £3 per Cent. Annuities, representing the above share, was now standing in Court to the credit of this matter.

Mr. *Chitty*, for the Petitioners:—

Our contention is, that the share accrued, and that the representative of *J. W. Wilmott* is excluded.

The question depends upon the circumstance of the death of *J. W. Wilmott* without issue in the lifetime of the surviving tenant for life, he having attained twenty-one. Did he, by so dying, die before his share became, under the true construction of the settlement, "due and payable?" We say he did; and that his share was not "due and payable" until the death of the tenant for life.

In answer to the Court,

Mr. *F. T. White*, for the executrix of *J. W. Wilmott*, said his contention was, that *J. W. Wilmott* did not die before his share became "due and payable;" and, consequently, that his share was not divested. *J. W. Wilmott's* share was "due and payable" when he attained twenty-one; that is to say, it then became indefeasibly vested.

This is a marriage settlement, and the case is within *Emperor* v. *Rolfe* (1).

The VICE-CHANCELLOR:—But here there is a gift to the issue of children dying before their shares should become payable. Did that occur in *Emperor* v. *Rolfe* and the cases which followed it?

Mr. *White*:—It occurred in *Mocatta* v. *Lindo* (2), which may be said to rule the present case.

(1) 1 Ves. Sen. 209.

(2) 9 Sim. 56.

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[*Swallow* v. *Binns* (1); *Schenck* v. *Legh* (2); and *Mendham* v. *Williams* (3), were also referred to.]

The VICE-CHANCELLOR asked the counsel for the Petitioners to consider *Mocatta* v. *Lindo* (4).

Mr. *Chitty* (in continuation):—

The words "due and payable" are not precisely equivalent to the word "payable" alone.

In this case what can the words "payable as aforesaid," or the word "then," in the final clause, refer to, except the death of the surviving tenant for life? If the construction of the other side be adopted, it is quite clear that the children of any child who might attain twenty-one would be excluded from taking under the settlement, though their parent might die before the period of distribution arrived. That could scarcely have been the intention.

The true construction is, that the shares vested at birth, were payable at twenty-one or marriage, were liable to be divested during the life interests, and were indefeasibly vested at the death of the surviving tenant for life.

In *Mocatta* v. *Lindo* a forced construction was adopted; and here the Court is asked to go much further.

[*Crowder* v. *Stone* (5) was also cited.]

Mr. *Chester*, for the trustees of Mrs. *Briggs*'s settlement, supported the same construction as the Petitioners, and cited *Bright* v. *Rowe* (6), and *Creswick* v. *Gaskell* (7).

Mr. *White*, in reply.

SIR W. M. JAMES, V.C.:—

I certainly have no doubt whatever as to what the construction of this instrument would have been if the question had been *res integra*. The clauses are, to my mind, perfectly clear in pointing to this conclusion—that the settlor intended in every one of certain events that the vested interest in *James William Wilmott* should not be indefeasible, but should be liable to be divested during the lifetime of the tenant for life.

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(1) 1 K. & J. 417, 425. 1 Jur. N S 843
(2) 9 Ves. 300.
(3) Law Rep. 2 Eq. 396.
(4) 9 Sim. 56.
(5) 3 Russ. 217.
(6) 3 My. & K. 316.
(7) 16 Beav. 577.

That being my clear opinion, the only question is, whether I am bound by the authority of *Emperor* v. *Rolfe* (1) to give an artificial meaning to language of this kind occurring in a marriage settlement. The case of *Emperor* v. *Rolfe* originally established the strong and unrebuttable presumption, that in marriage settlements the shares of children are intended to become vested when they are wanted: that is to say, in the case of sons at twenty-one, and of daughters at twenty-one or marriage; and it certainly would require very strong language indeed to shew that any other construction than this would be consistent with "the truth and honour" of the settlement.

But the distinction between that case and the present is this—that in *Emperor* v. *Rolfe* the issue of children dying in the lifetime of the tenant for life were unprovided for. Here, the settlor seems to me to have provided for every event. If any of the objects of his bounty should "happen to be dead, leaving issue," there is a gift "unto the issue of such one or more which shall be then dead." If any of them should "happen to depart this life without issue," the survivors and survivor are entitled in equal shares. If all should be dead "at the time of the decease of the survivor" of the husband and wife, there is a gift over to other persons. It seems to me, therefore, that the principle of *Emperor* v. *Rolfe* does not apply to this case.

But I should certainly have thought the case clearer than it is, had it not been for the decisions in *Mocatta* v. *Lindo* (2), and *Mendham* v. *Williams* (3).

In *Mocatta* v. *Lindo* there was a gift to the child and children of the marriage, "to be paid and payable" at twenty-one or marriage, and to the children or issue of such child or children as should happen to die leaving a child or children before their respective shares should become "payable as before mentioned;" and in case any such child or children should happen to die "before their shares should become payable" without leaving issue, a gift to the survivors; and it was held that the word "payable" must mean "vested." I am bound to say I do not think I should

(1) 1 Ves. Sen. 209. (2) 9 Sim. 56. (3) Law Rep. 2 Eq. 396.

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In re WILMOTT'S TRUSTS.

have held, upon that instrument, that the word "payable" meant "vested."

In this case there is no question about vesting at all. The question is one of divesting; and the gift to the issue of a child dying does not depend upon the death of that child under twenty-one, as in *Mocatta* v. *Lindo* (1), and *Mendham* v. *Williams* (2), but the gift to the issue of a child dying is to take effect upon the death of that child at any time during the lifetime of the tenant for life.

Endeavouring to give effect to every word of this settlement, I think that this is one of those cases in which the intention of the testator is so clearly expressed as to relieve me from the necessity of resorting to a rule of construction by which I should otherwise feel myself bound.

I therefore decide that *James William Wilmott* having died without leaving issue in the lifetime of the tenant for life, his representative is not entitled to his share, and that the same went over to the surviving children of the marriage, and the issue of the child who had died leaving issue.

Solicitor for the Petitioners: Mr. *A. S. Edmunds.*

Solicitors for the Respondents: Messrs. *Jones, Arkcoll, & Jones*; Messrs. *Batt & Son.*

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1869
March 4, 5, 12.

NOWELL *v.* NOWELL.

Partnership by Parol—Agreement to share Profits and Losses equally—Unequal Advances—Insufficient Assets—Deficiency to be borne in equal Shares.

13 Ch. D. 845.

A. and *B.* went into partnership without written articles; the parol agreement between them being that profits should be shared and losses borne in equal shares. *A.* died, and on accounts of his estate being taken in an administration suit, it was found that he had advanced more capital than *B.*, to the extent of £1900. The net assets of the partnership were only £1400:—

Held, that the deficiency of £500 was a debt to which both estates were liable to contribute equally.

THOMAS NOWELL, the testator in the cause, from some time in the year 1853, down to his death on the 10th of December, 1855, was in partnership with his brother, the Defendant *Jacob*

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(1) 9 Sim. 56.

(2) Law Rep. 2 Eq. 396.

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Nowell, in the business of builders and contractors. The partnership was carried on without written articles; the parol agreement being that the two partners were to be entitled to the profits and liable to the losses in equal shares.

The bill was filed on the 7th of April, 1865, by persons beneficially interested in the testator's estate, for administration. Several questions arose, and amongst the rest the following:

Part of the assets had been sold; there had been no final or other settlement of the partnership accounts; but a cash account had been taken in respect of the advances of the respective partners, interest on such advances, and allowance for management; the result of which was that it was found that the testator's advances amounted to £1929 12*s.* 7*d.*, and those of *Jacob Nowell* to £29 8*s.*, shewing an excess of the amounts brought into the partnership by the testator over those brought in by *Jacob Nowell*, to the extent of £1900 4*s.* 7*d.*

The available net assets of the partnership amounted only to £1400, leaving a deficiency of £500; and the question was, whether this deficiency of £500 ought to be borne by the testator's estate alone, or whether it ought to be borne by the estates of both partners equally, in which case the estate of *Jacob Nowell* would be indebted to the testator's estate in the sum of £250.

Mr. *Druce*, Q.C., and Mr. *J. L. Bird*, for the Plaintiffs:—

We say that half this deficiency ought to be borne by *Jacob Nowell's* estate; not the whole by the estate of the testator. Whether this £500 be called an advance to capital account or a debt is immaterial; the loss must still be borne as the profit was shared, *i.e.* in moieties.

Mr. *Willcock*, Q.C., and Mr. *Bagshawe*, for Defendants, trustees of the will:—

The trustees have acted upon and support the view, that this £500 is a loss which must be borne by the testator's estate alone.

This view appears to be supported by Mr. *Lindley* in the following passage:—

"Where partners advance unequal capitals, but agree to share profits and losses equally, what they mean is, that each shall risk

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his whole capital, and share profits and losses equally, so far as equality is consistent with such risk. . . . If the assets are not sufficient to pay the debts and liabilities to non-partners, the partners must treat the difference as a loss, and make it up by equal contributions, unless otherwise agreed; although, by reason of having had unequal amounts of capital, their total losses may be very unequal. So if the assets are more than sufficient to pay the debts and liabilities of the partnership to non-partners, but are not sufficient to repay the partners their respective advances, the amount of unpaid advances ought, it is conceived, to be treated as a loss, to be met in like manner as before by an equal contribution, regardless of the capitals lost. In such a case the advances ought to be treated as a debt of the firm, but payable to one of the partners instead of to a stranger. But if, after paying all the debts and liabilities of the firm and the advances of the partners, there is still a surplus, but not sufficient to pay each partner his capital, such surplus must be divided between the partners in proportion to their respective capitals, and each partner must lose the balance of his capital which the assets thus applied are insufficient to pay. This is obviously right where the losses are proportionate to the amounts of capital; and it appears also to be the rule where profits and losses are to be shared equally by persons where capitals are unequal. In the case now supposed, to treat the balances of capitals remaining unpaid as a loss to be made good by equal contributions, would be inconsistent with the agreement by each partner to risk his capital:" *Lindley* on Partnership (1), referring to *Wood* v. *Scoles* (2).

Mr. *Casson*, for *Jacob Nowell*, supported the same view.

Mr. *Ince*, for Defendants in the same interest as the Plaintiffs.

Mar. 12. SIR W. M. JAMES, V.C., on this point, said:—

This balance of £500 constituted a debt—a loss—to which both parties were liable equally to contribute; and there is, therefore, a debt of half that amount due from the surviving partner to the other partner.

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(1) 2nd Ed. pp. 790, 791.

(2) Law Rep. 1 Ch. 369.
12 Jur. N.S. 555

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I intimated this opinion in the course of the argument, and I was referred to a passage in Mr. *Lindley's* valuable book, and to a judgment of the Lords Justices in *Wood* v. *Scoles* (1), as being opposed to that view. The decision of the Lords Justices turned entirely on the construction of a special clause in the articles of partnership. If Mr. *Lindley's* book is supposed to intimate that, in the absence of express or implied stipulation to the contrary, partners are not to contribute equally to every loss, whether that loss is a loss of the original capital brought in or any other loss, I have no hesitation in expressing my entire dissent from it.

Whether moneys are brought in originally as capital, or advanced subsequently, or paid by one partner at the winding-up, is, in my judgment, wholly immaterial. In the absence of stipulation to the contrary, the community of profit involves like community of loss.

Every partnership is a series of partnership adventures; and if the matter be tested by one adventure, the rule is made very clear. Two persons engage in a speculation, say in the purchase of £1000 worth of cotton. One partner has the £1000 at his command, the other has not. The first partner advances his £1000 for the purpose of the speculation. If the cotton produces £1100, the £100 is divided between the two parties. If it only produces £900, could it be contended that the capitalist partner is to put up with the entire loss; and that the game of partnership between the man without money, and the man with, was to be on the principle of "Heads, I win; tails, you lose?"

I hold it to be clear, therefore, that in this case *Jacob Nowell* was bound to pay half the deficiency between the available assets and the excessive amount advanced by his deceased partner.

Solicitors for the Plaintiffs: Messrs. *Clarke, Woodcock, & Ryland*, agents for Mr. *B. Chesshire, Birmingham.*

Solicitors for the Defendants: Messrs. *Ridsdale & Craddock*, agents for Mr. *B. Chadwick, Dewsbury;* Mr. *William Pitman*, agent for Mr. *Henry Brown, Wakefield.*

(1) Law Rep. 1 Ch. 369. 12 Jur NS 555

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April 19.

7

App Cas 417

WILLIAMSON *v.* WILLIAMSON.

Banker and Customer—Banking Account—Commission—Compound Interest.

A banking account, which was largely overdrawn, was for the half-year ending June, 1867, charged with interest at 5 per cent., and with a gross sum of £500 for commission, in lieu of the charge of one-half per cent. previously made. The pass-book balanced on this footing was sent to the customer, and the charges were explained to his agent (the customer himself being in weak health, and unable to attend to business matters). The customer died in December, 1867, and did not raise any objection to these charges:—

Held, that the charge of £500 for commission had been acquiesced in, and was valid for the half-year ending June, 1867; but that acquiescence could not be inferred for subsequent half-years, there being nothing in the entry for the particular half-year that amounted to a contract to the same effect *in futuro*:

Held, also, that the right of the bank to charge compound interest terminated with the death of the customer; and that from that period simple interest only at 5 per cent. was chargeable on the account.

ADJOURNED SUMMONS upon a claim sent in by the *Manchester and Liverpool District Banking Company* against the estate of the testator, *Hugh Henshall Williamson*, which was being administered in this Court, for £116,403 19*s.*, as the balance of account, made up partly by charges for commission, and partly by overdrafts and accumulations of interest.

It appeared that for some years before his death the testator kept a banking account with the company at their branch at *Hanley*. When the account was opened, the limit of overdraft was £5000, and the account was debited half-yearly with a commission on all money paid out of the bank, at the rate of one quarter per cent. In June, 1863, the debit balance, or overdraft, having increased to £34,000, and the turnover in the account being only £27,000, the bank commenced charging the testator with commission at the rate of one-half per cent. until 1867, when the overdraft having reached £106,000, while the account was almost dormant, the bank, for the half-year ending June, 1867, charged a gross sum of £500 for commission; and (according to the affidavit of the manager) "determined for the future, and so long as the account remained in anything like the same state, to continue to charge" this amount.

With regard to this charge for commission, it was stated in the evidence that the ordinary charge by country bankers was 5s. for every £100 drawn out; and to render the account satisfactory, the rule was, that the amount of "turnover," or, in other words, the amount drawn out, should in each year be at least eight times the amount of advance—anything less than this not being considered satisfactory. When an account was conducted satisfacfactorily, it was not unusual either to modify the percentage charge for commission, or to commute it into a fixed sum per annum, irrespective of the amount of turnover; on the other hand, when an account was very unsatisfactory in its turnover, or when the advance was increased to an unreasonable amount, it was quite optional with the banker to increase the charge, either to a higher rate per cent., or to a fixed amount per annum, leaving it to the customer, if he objected, to close the account.

The bank had also charged the testator with interest with annual rests upon the overdrawn account. From 1864, when the account had got into a very unsatisfactory state, the rate of interest was raised, and although in some half-years the Bank of *England* rate had fallen as low as 2 or 3 per cent., a minimum rate of 5 per cent (according to the usual custom of bankers when the overdraft is large in amount) had been charged by the claimants.

In March, 1866, the testator deposited his title deeds with the bank, with a memorandum that the same should be a security for the payment of all sums of money which then were or should be owing to the bank, together with interest for all or any such sum and sums, and also all the charges for commission and other banking charges which the bank should at any time thereafter claim, pay, or advance from or to him.

The testator, for some time before his death in December, 1867, was very infirm, and not able to go to the bank; his business, down to August, 1866, having been principally managed by his nephew, *Robert Williamson,* and after that period by *John Butterfield,* his cashier and sub-manager.

In February, 1867, *Butterfield* wrote to *Walker,* the manager of the bank, asking for information as to the bank charge for discounts on trade bills for 1865–6, attention being called to the high rate of interest charged to the testator during 1866. *Walker,* in

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reply, sent the particulars and returned the pass-book, and no answer was sent to his letter. The pass-book, made up and balanced to the end of June, 1867, on the basis of 5 per cent. interest and £500 commission, was handed to *Butterfield*, as agent for the testator, and the charges were explained to him by *Walker*. After June, 1867, the pass-book was entered up several times at the request of *Butterfield*, who stated that the testator wished to see how the account stood from time to time.

No objection having been raised by the testator or *Butterfield* to the principle on which the account had been balanced up to June, 1867, it was assumed, according to the usual course of business, which was deposed to by several witnesses, that the account as made up in the pass-book containing these charges for commission and interest was acquiesced in. During the half-year ending the 31st of December, 1867, the turnover was less than previously, and the bank continued to charge the same rate for interest and commission as in the previous half-year.

The testator died on the 3rd of December, 1867.

In the evidence filed in opposition to the claim, it was stated that the testator, though unable, from the state of his health, from about June, 1866, to make any regular investigation of the bank account, frequently complained to his agent of the excessive charges both for interest and commission, and stated (to his solicitor) that he should insist upon having the account properly investigated. The solicitor, however, knowing the state of *Williamson's* affairs, and the impossibility of avoiding bankruptcy if the bank pressed for immediate payment, did not consider it prudent, during *Williamson's* lifetime, to make any complaint or representation to the bank managers with respect to their excessive charges for interest and commission.

In the event of the charges being reduced to one-quarter per cent for commission, and to 1 per cent above the Bank of *England* rate of discount for interest, which was stated in the evidence in opposition to the claim to be the ordinary charge made by country bankers, £6194 15*s.* 2*d.* would have to be deducted from the balance claimed by the bank.

Sir *Roundell Palmer*, Q.C., Mr. *Little*, Q.C., and Mr. *Bedwell*, in

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support of the claim, contended that the accounts, which had been acquiesced in by the testator for so many years, must be treated as settled accounts, and could not now be opened. According to the evidence the charges for interest and commission were fair and reasonable, having regard to the state of the account. They were communicated to the testator, and as no objection was ever made by him, he was bound by acquiescence, and the arrangement could not now be disturbed. They cited *Lord Clancarty* v. *Latouche* (1); *In re East of England Banking Company* (2).

Mr. *Amphlett*, Q.C., Mr. *E. C. Batten*, and Mr. *Bristowe*, for the representatives of the testator:—

With respect to the charge of £500 for commission, even assuming that knowledge of the pass-book was brought home to the testator, so that he had notice of the charge for the particular half-year, he cannot be taken to have acquiesced prospectively in this charge for all succeeding half-years. With respect to interest, the relationship of banker and customer ceases upon the death of the customer, and any right to compound interest, which is wholly incidental to that relationship, is at once terminated. The account is closed from that date, and the bank is only entitled to have the amount of balance at the death of the customer ascertained, and to charge interest at 5 per cent. upon the ascertained balance: *Croskill* v. *Bower* (3); *Mosse* v. *Salt* (4); *Ferguson* v. *Fyffe* (5).

Sir *Roundell Palmer*, in reply.

SIR W. M. JAMES, V.C.:—

The only points to be decided relate to the second sum of £500 charged for commission, and to the interest; the third sum of £500 being entirely in respect of the period after the testator's death when no business would have been transacted, the bank are clearly not entitled to charge it. With regard to this second sum of £500 I think the bank are not entitled to charge it. The communication from *Walker* to *Butterfield* did not amount to an

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(1) 1 Ball & B. 420.
(2) Law Rep. 4 Ch. 14.
(3) 32 Beav. 86. 9 Jur NS 267
(4) Ibid. 269.
(5) 8 Cl. & F. 121.

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engagement that £500 would be charged for every future half-year, but was confined to the charge for that particular half-year. Mr. *Williamson* was, of course, informed of that charge, and was bound by it, but there was no further contract; they might have charged either more or less in subsequent half-years. With regard to the interest accruing after the testator's death, I should take some time before assenting to the proposition that the account did not bear simple interest, but I have not to decide this point. I am bound, however, by the authority of the House of Lords to hold that compound interest is incidental to the continuance of the relation of banker and customer. From the testator's death therefore, only simple interest at 5 per cent. will be allowed on the account. The first charge of £500 for commission will be allowed, the second and third charges disallowed, but in lieu of the second charge one-half per cent. upon the turnover is to be charged.

Solicitors: Messrs. *N. C. & C. Milne*; Messrs. *Wedlake & Letts.*

V. C. J.
1869
Feb. 26.

MARSON *v.* LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

Lands Clauses Act, s. 92—*Further Consideration—Order compelling Company to take Proceedings to ascertain Amount to be paid—Form of Order.*

168£ 460;-/
19£ 83.1-7

Defendants, a railway company, gave to the Plaintiffs a notice to treat for the purchase of a portion of a piece of land; and the Plaintiffs gave the Defendants a counter-notice to take the whole. The company paid into Court the value of the portion of the piece of land described in their notice to treat, gave to the Plaintiffs the usual bond for the amount, and went into possession of the portion.

In a suit praying for a declaration that the Defendants were bound to purchase the whole of the premises comprised in the Plaintiffs' counter-notice, and for an injunction, it was declared that the Defendants were so bound; and an inquiry was directed as to title, reserving further consideration.

The title having been found to be good, but the company not having gone into possession of the rest of the premises described in the counter-notice, or taken any further steps:—

Held, on further consideration, that the Plaintiffs were entitled to an order compelling the company forthwith to take all necessary and proper proceedings, under the *Lands Clauses Act*, for the purpose of ascertaining the amount to be paid by them to the Plaintiffs as the value of the premises.

FURTHER CONSIDERATION.

This was a suit by landowners against a railway company, who had, on the 18th of July, 1865, given the Plaintiffs notice to treat for the purchase of a small portion (one-third of a perch) of a vacant piece of copyhold land. To this notice the Plaintiffs, on the 20th of July, 1865, sent a counter-notice, requiring the company to take the whole of the piece of land, and also a public-house of which the Plaintiffs asserted the vacant piece of land to be the curtilage, and requiring the company to pay them the sum of £1750 for the purchase of their interest in the same premises within twenty-one days.

The company deposited £10 in the *Bank of England* as the value of the property comprised in their notice to treat, being the sum determined to be the value of the fee simple (subject to a lease) thereof by a surveyor nominated by a magistrate according to the provisions of the *Lands Clauses Act ;* and delivered to the Plaintiffs' solicitors the usual bond for the same amount under the seal of the company.

On the 1st of September, 1865, the company took possession of the portion of the piece of land mentioned in their notice to treat, and proceeded to build upon it part of one of the piers upon which their line of railway is supported.

The bill was filed on the 19th of September, 1865, against the company and certain trustees of a settlement in whom the leasehold interest was vested, praying for a declaration that the company were bound to purchase the whole of the premises comprised in the counter-notice, and that the Plaintiff was not bound to sell a part of the said premises, he being able and willing to sell and make a title to the whole; also for an injunction to restrain the company from taking any further proceedings to entitle themselves to a part of the said premises without taking the whole, and from continuing in possession of the part upon which they had already erected a pier and arches, and from allowing the bricks and mortar made into such pier and arches to remain thereon; and for costs, and further relief.

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The bill prayed no other relief.

On the 1st of May, 1868, Lord Justice *Giffard*, then Vice-Chancellor, made an order declaring that the company were bound to purchase the whole of the property comprised in the Plaintiffs' counter-notice, and that the Plaintiffs were not bound to sell a part of the said premises to the company, they being able and willing to sell and make a title to the whole thereof, and directed an inquiry as to title; reserving further consideration, with liberty to apply. The case is reported (1).

The inquiry had been made, and the title found to be good; but the company had not gone into possession of the rest of the premises comprised in the counter-notice, or taken any further steps in the matter.

Mr. *Druce*, Q.C., and Mr. *Bardswell*, for the Plaintiffs:—

There is no precedent pointing out what course is to be pursued by Plaintiffs in our situation. The bill does not pray specific performance, because there is no contract of which performance can be enforced; and we cannot proceed under the 67th section of the *Lands Clauses Act*, because the company has not gone into possession. We cannot enforce our decree otherwise than by asking the Court to compel the company to take proceedings under the *Lands Clauses Act*. Unless this be done, we are without remedy.

[They asked for the order below stated.]

Mr. *Amphlett*, Q.C., and Mr. *Kekewich*, for the company:—

No such order as this was prayed for by the bill; and no case for it is made by the pleadings. Whatever remedy might have been open to the Plaintiffs in a suit for specific performance, it is clearly incompetent to the Court to grant such relief as this upon further consideration of a suit framed as this is.

Mr. *Horsey*, for the settlement trustees.

SIR W. M. JAMES, V.C.:—

The Plaintiffs are clearly entitled to the benefit of the decree made by Lord Justice *Giffard;* and if the company persevere in

(1) Law Rep. 6 Eq. 101.

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and Dover
Railway Co.

16 Eq. 460-1

their resistance to the order asked for by the Plaintiffs, I shall grant a mandatory injunction.

An order was then made, in terms of which the following are minutes:—

Order that the Defendants the company do forthwith take all necessary and proper proceedings under the provisions of the *Lands Clauses Act*, 1845, for the purpose of ascertaining the amount to be paid by the said Defendants the company to the Plaintiffs as the value of the whole of the copyhold premises in the bill mentioned.

Order that the Defendants the company do pay to the Plaintiffs the value of the said copyhold premises within one month after such value shall have been ascertained in manner aforesaid; and thereupon

Order that the Plaintiffs do execute a proper conveyance and surrender of the premises to the Defendants the company; such conveyance to be settled by the Judge if the parties differ.

Declare that the Plaintiffs are entitled in the meantime to a lien on the said copyhold premises for the value thereof so to be ascertained as aforesaid.

Tax the costs of the Defendants the trustees.

Order the Plaintiffs to pay such taxed costs.

Tax the costs of the Plaintiffs.

Order the Defendants the company to pay the Plaintiffs' costs of the suit, including the costs of the Defendants the trustees.

In case default be made by the Defendants the company in paying the Plaintiffs the value of the said copyhold premises, when so ascertained as aforesaid, within the time appointed for the purpose as aforesaid, the Plaintiffs to be at liberty to apply to this Court with respect to the possession of the said copyhold premises, or to the enforcing their said lien.

Any other parties to be at liberty generally to apply as they may be advised.

Solicitors for the Plaintiffs: Messrs. *Marson & Dadley.*

Solicitors for the Defendants: Messrs. *Freshfields;* Messrs. *Underhill & Field.*

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1869
March 6, 8, 12.

In re LONDON AND COLONIAL COMPANY.

Ex parte CLARK.

Company—Colonial Agent—Shareholder—Agreement that Call Money should be debited in Agency Account—Continued Employment after Liquidation—Set-off—Salary.

9 Eq 150
[illegible]

By an agreement between a limited trading company and their agent in a British colony, it was provided that the salary of the agent was to be £750 a year for a period of five years from the day of his arrival in the colony; and in addition he was to be allowed certain commissions on remittances in money or produce which should be made by him to *England*. The agent was to pay up at once £2 per share on fifty shares of £100 each, which he had been required to take in the company, and the company agreed from time to time to place £8 per share, as well as all other sums that might become due from the agent, to his debit on account of the calls to be made on the shares.

Whether such an agreement could be lawfully made by a company with one of its shareholders, *quære*.

The agent arrived at the colony in December, 1865, and commenced business. In March, 1867, a voluntary winding up of the company was ordered to be continued under supervision, and in January, 1868, the agent's services were put an end to, under a power of attorney from the company and the liquidators, upon certain terms of compromise then agreed to:—

Held, independently of the agreement, that the liquidators having, in the course of their continued employment of the agent, become indebted to him, and having entered into the compromise, were not entitled to enforce against him the payment of a call made in the winding up without bringing the debt into account:

Held, further, following *Yelland's Case* (1), that the agent was entitled to his full salary to the end of the five years.

THIS was a summons on behalf of *Theodore Brook Jones* and *John Spong*, liquidators of the *London and Colonial Company, Limited*, that *Robert Colvin Clark*, of *Melbourne*, at present residing in the *United Kingdom*, might be ordered, on or before the 16th of July, 1868, or within four days after the service of the order, to pay to the liquidators the sum of £1000, in respect of a call of £20 per share made by the liquidators, by a notice dated the 26th of November, 1867.

There came on also at the same time a summons on behalf of *Clark*, that directions might be given to the liquidators to come to a settlement with him in respect of his several claims against the company and its assets, including certain claims then pending in the Courts of the colony, having regard to certain "Heads of Settlement," dated the 29th of February, 1868, which were agreed upon and signed by the solicitors in the colony for the applicant and for the company, and also by *Alexander Martin*, as the attorney in the colony duly authorized in that behalf for the company; and that, if necessary or advisable, the "Heads of Settlement" might be embodied in a formal agreement; and that the liquidators might be ordered to execute, on behalf of the company, the agreement when prepared, the applicant being ready and willing, and thereby offering, to carry out the arrangement on his part, and to execute the formal agreement; and further, that the liquidators might be directed not to enforce against the applicant the payment of any call as a contributory of the company until such settlement should have been come to, or until further order.

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(1) Law Rep. 4 Eq. 350.

A motion was also made on behalf of the liquidators to restrain *Clark* from prosecuting certain proceedings which had been instituted by him in the Supreme Court at *Melbourne*.

It appeared from *Clark's* affidavit that in September, 1865, he was appointed the agent of the company at *Melbourne*. A few days after he had verbally accepted the appointment the managing director told him it was necessary he should take fifty shares of £100 each, as a guarantee for the faithful discharge of his duties; and after some demur he consented to do this, and paid £100 deposit.

On the 30th of September an agreement was entered into between the company of the one part and *Clark* of the other part, whereby *Clark* covenanted with the company that he would proceed to *Melbourne* on the 4th of October then next, and upon his arrival would commence his duties in the company's employment. The company agreed to pay the passage out of *Clark* and his wife. His salary was to be £750 a year for a period of five years, commencing from the day of his arrival at *Melbourne*, and, in addition, he was to be allowed a commission of 2½ per cent. on all remittances for the company's shipments. In the event of the company ordering the remittances to be made in produce, *Clark* was to be allowed a commission of 3½ per cent. upon the net cost of the produce instead of the former commission. The company agreed

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to defray "all expenses for offices, warehouses, and staff of clerks," and the risk of all sales on account of the company. *Clark* agreed to act "as an independent merchant," and the agreement proceeded as follows: "And it is not to be known that he is conducting the business of the said company. The said *Robert C. Clark* shall carry on business under the style of *Colvin Clark & Co.*, but is to be, in fact, the servant of the company only."

"5. That the said *Robert C. Clark* shall not carry on any business not authorized by the said company, nor shall he be at liberty to use the moneys or pledge the credit of the said company in any way for any business whatever except that of the proper business of the said company."

6. "That, subject to the arrangement hereby made, the said *Robert C. Clark* shall be at liberty to transact any sales or other business upon commission or otherwise; and as to all these transactions, and on any business influenced to or from *Melbourne*, or carried on in any part of *Australia* by the said *Robert C. Clark*, one-half of the commission or profits shall belong to the said company, and the other half to the said *Robert C. Clark*. . . . ."

8. "That the said *Robert C. Clark* having applied for and taken fifty shares of £100 each in the said company upon which £10 per share is to be paid up at once, and having already paid £2 per share, part of such £10 per share, the company will, on their part, place £8 per share, the balance of such £10 per share, on the said fifty shares to the debit of the said *Robert C. Clark*, as well as all other sums that may become due from the said *Robert C. Clark* from time to time on account of the calls to be made on the said fifty shares."

Clark also agreed (clause 9) to give a security for the payment of £8 per share, and of all future calls on the shares, by a charge in the nature of an equitable mortgage upon a coffee estate in *Ceylon;* and security to cover any sums that might from time to time become due from him to the company. If *Clark* continued to give satisfaction to the company, he was to continue to have the sole conduct of the business of the company at *Melbourne* for five years, or such further period as should be agreed upon.

By a memorandum annexed to the agreement it was provided that if *Clark* should, on his way to *Melbourne*, arrange for the payment to the company of a sum of £2400 cash in respect of the fifty shares, and would undertake not to sell the shares during the continuance of the agreement, the charge should not be required to be made by bond at *Ceylon*, and registered in the usual mode there.

Clark said he entered into this further agreement on the express statement of *Frederick Thomas Elworthy*, the managing director, and *Spong*, the secretary, that he would not be called upon to make any further payment in respect of the shares; and in consequence of these statements *Clark*, on his way to *Melbourne*, put in at *Ceylon*, and there prevailed on the trustees of his marriage settlement to advance him £2400, which he transmitted to the company, and received back from them his equitable mortgage, with a memorandum indorsed thereon that the security had been satisfied.

From his arrival in *Melbourne* in December, 1865, to the middle of January, 1868, *Clark* continued to act as the agent of the company under the agreement, when his services were put an end to by Mr. *Alexander Martin*, acting under a power of attorney from the company and the liquidators. An order for continuing the winding up of the company under supervision had been made on the 6th of March, 1867.

Clark thereupon took proceedings in the Supreme Court at *Melbourne* against the company by foreign attachment against the moneys and goods of the company in the possession of *Martin*, and *Martin* commenced proceedings in equity against *Clark* in the same Court.

On the 29th of February, 1868, an arrangement of all the proceedings then pending, called "Heads of Settlement," was come to between the solicitors acting on behalf of *Clark* and the solicitor acting for the company and liquidators, and the terms were reduced into writing, and afterwards, on the 3rd of March, 1868, were confirmed and signed by *Martin* on behalf of the company. By this agreement £4000 was to be reserved out of the first proceeds of the goods to meet *Clark's* claims against the company. Of this sum £1000 was to be paid to *Clark* on account of his claims without prejudice, and to enable him to proceed to *England*; and, in the event of his failing to settle with the company

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within six months, he undertook to prosecute his proceedings in the Supreme Court without delay. The remaining £3000 was to be deposited in the *Victoria Bank, Melbourne,* in the joint names of the liquidators, *James Morrison & Co.*, and *Clark*, to abide the result of the proceedings in the Court of the colony.

Pending these proceedings and arrangements, *Clark* was placed on the list of contributories of the company in respect of fifty shares. He received the £1000 under the agreement, and on the 20th of April arrived in *England.*

He now claimed to set off his claims upon the company against the call.

He further claimed against the company the following sums:—(1), in respect of his salary of £750 per annum for two years and eleven months, from the 18th of January, 1868, to the 18th of December, 1870, £2187 10*s.*; (2), for commission at 2½ per cent. on £6466 3*s.* 5*d*, amount of invoices of goods consigned by the company to *Martin,* £161 13*s.* 1*d.*; (3), for commission at 2½ per cent. on £7475 7*s.* 9*d.*, amount realized by the sale of goods shipped by the company to a firm of *Woodville & Co.* in contravention of the agreement of the 30th of September, 1865, £186 17*s.* 8*d.*; (4), estimated commission which would have been payable to him during the remainder of his engagement, £2570 11*s.* 6*d.*; (5), expenses of his voyage to and from *England,* and of maintenance in *England,* £430; (6), passage of himself and wife from *Melbourne* to *England,* £300; (7), estimated cost of legal proceedings in *Melbourne* against the company, £150; total, £5986 12*s.* 3*d.*

The liquidators, on the other hand, said that *Clark's* services were terminated by *Martin* in consequence of his not being able to get from *Clark* any satisfactory account of the moneys in his hands.

They disputed the items on the following grounds:—The first, because *Clark* would not be able to render any services to the company for the said term; the second, because the commission was payable, not upon invoice prices, but upon remittances, which were, on the average, 25 per cent. less than the invoice prices; the fourth, because the company were not bound to make any shipments, and that as it had now become impossible for them to do so, no claim should be allowed in respect thereof, inasmuch as no

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remittances could be made to this country; they said, further, that the amount of remittances made by *Clark* during 1867 was not more than £23,484 11*s.* 7*d.*, the commission upon which, at 2½ per cent., would be £587 2*s.* 3*d.* only; the fifth, because the claim of £430 was not a subject of the heads of settlement; and the others they submitted to the judgment of the Court.

Mr. *Druce*, Q.C., and Mr. *C. Hall*, for the liquidators:—

The motion for an injunction is founded on the 87th section of the *Companies Act*, 1862, which provides that after a winding-up order no proceeding shall be continued without leave of the Court.

The summons for payment of the moneys due on calls is founded on sects. 100 and 101 of the same Act.

Power for the liquidators to compromise with creditors is provided by the 159th section, and with contributories by the 160th.

The only question, therefore, is, whether the Court will exercise its power. The proceeding of *Clark* by foreign attachment when he might have proved in the liquidation was, to say the least, a very strong measure. We contend that the compromise called "Heads of Settlement," in so far as it dealt with these proceedings which had not been sanctioned by the Court, was wholly void. *Clark*, as agent of the company, was holding assets which not only it was the duty of the liquidators to realize, but which he, as agent, knew he could not deal with except in conformity with the statute. He was therefore not justified in putting any part of the assets beyond the control of the Court. He was also a contributory of the company. Every provision of the Act of 1862 was binding on him; whether the foreign Court would act on the order of this Court or not.

The other question arising on the cross summons is, whether the liquidators can be ordered, on *Clark's* application, to come to an arrangement with him on the footing of the "Heads of Settlement;" in other words, whether he can set off his claim against the call. Practically it comes to an application to have specific performance of the 8th and following clauses in the agreement of the 30th September, 1865; clauses which we say are illegal and cannot be enforced; *Grissell's Case* (1); which was followed in *In re Duck-*

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(1) Law Rep. 1 Ch. 528. 12 Jan 1866

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worth (1). The liquidators' summons must be enforced independently.

As to restraining proceedings in the foreign Court, there is no distinction between this case and the authorities of *Beauchamp* v. *Marquis of Huntley* (2); *Graham* v. *Maxwell* (3); *Carron Iron Company* v. *Maclaren* (4).

Mr. *Kay*, Q.C., and Mr. *Higgins*, for *Clark*:—

Mr. *Clark* is entitled to set off his claim against the amount recoverable from him in respect of calls; *Garnet and Moseley Gold Company* v. *Sutton* (5).

Although the original contract was determinable by the company at six months' notice, Mr. *Clark* is entitled to his salary for the whole of the remaining term; *Yelland's Case* (6). Moreover, the old contract was, after the winding-up, adopted by the liquidators.

The dismissal of Mr. *Clark* was a wrongful act on the part of the liquidators.

The Australian Court is the proper tribunal; and a bill ought to have been filed there.

Mr. *Clark* is also entitled to compensation for the loss of warehouses and a staff of clerks; it having been intended that he should set up as an independent merchant if he should cease to be the company's agent.

Mr. *Druce*, in reply.

[*Habershon's Case* (7) was cited.]

SIR W. M. JAMES, V.C.:—

I am of opinion in this case, that Mr. *Clark* is entitled to be relieved at present from the payment of the £1000, notwithstanding the decision in *Grissell's Case* (8), which I think it is not necessary for me to consider.

With reference to the great subject of the argument, the effect of the 8th, 9th, and other clauses of the agreement, giving security

(1) Law Rep. 2 Ch. 578, 580.
(2) Jac. 546.
(3) 1 Mac. & G. 71.
(4) 5 H. L. C. 416.
(5) 3 B. & S. 321.
(6) Law Rep. 4 Eq. 350.
(7) Ibid. 5 Eq. 286.
(8) Ibid. 1 Ch. 528.

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on the *Ceylon* estate, which would seem to imply that it was part of the original bargain that there should be a set off, I do not wish to express an opinion how far a bargain of that kind would be good, because if one were to lay down a rule of that kind it would be very easy to say that any shareholder might enter into any bargain as to any goods he sold, and one does not see where the limit of it would be.

In this particular case, having regard to the fact that the liquidators themselves have continued this gentleman in his situation as their agent, and that the company, therefore, in its winding up, has become absolutely indebted to him in a sum which cannot be very far short, if at all, of £1000, I think it would be monstrous if he were compelled to pay £1000 into the coffers of the company when at that moment the company ought to pay him, not as a creditor, but as a person to be paid by the liquidators out of the first assets of the company, a sum as large, or nearly as large. Therefore I think that I am authorized in saying that the liquidators ought not to enforce this £1000 pending the ascertainment of the amount due to Mr. *Clark*.

I think, also, that I cannot allow the company, being now in course of liquidation, to say that the agreement which was made in *Australia* was *ultrà vires* the liquidators, or *ultrà vires* the attorney whom they sent out. It is quite clear that Mr. *Clark* had commenced proceedings in *Australia*, that apparently, according to the law of that country, he was entitled to maintain the action, and if not, the proper course would have been to have stayed the proceedings there; because Mr. *Clark* at that moment was not subject, and the property was not subject to the jurisdiction of this Court, and he took such proceedings as he was advised in *Australia* for the purpose of obtaining the payment of his demand by means of the attachment. That being so, the agent came to what seems to me to have been a very reasonable arrangement, but which required the previous sanction of the Court, and I should have had no hesitation in sanctioning that arrangement, which was, that a sum of £1000 should be paid to Mr. *Clark* in order to enable him to arrive in this country, and that the £3000 should be put *in medio* for the purpose of securing him his claim. The company have taken the benefit of that agreement. They have got all the goods *ultrà* the £4000 placed in their hands, and they have got the £3000 itself secured in this way. That being so, unless I can see my way to rescind the whole agreement and to place things exactly as they were at the time the agreement was made, restoring everything into the possession of Mr. *Clark*, or into the position it was when the foreign attachment was issued, I must hold that both parties must act according to the good faith of the agreement; which is, that to the extent of the £3000, at all events, Mr. *Clark* has a lien, which probably will render it unnecessary to determine in what way he is to recover from the assets of the company that which may be found ultimately due to him; that is, whether he is to receive part of his claim in priority to other creditors, or whether he is to come in merely *pari passu* with the other creditors for a dividend. I hold that to the extent to which the £3000 is *in medio*, he has a security upon that fund for anything found due to him under the arrangement.

I shall order Mr. *Clark*, the liquidators, and Messrs. *Morrison*, to concur in all steps necessary for the purpose of having the £3000 transferred to this country, to be carried to a separate account which may be ear-marked with reference to the agreement. I shall have that carried to the account of the money deposited under the agreement.

I am quite satisfied that Mr. *Clark's* claim is a substantial claim; but it is desirable that there should be some declarations made before it goes into Chambers, in order to prevent the thing being quite at large there. Accordingly, I will, in the course of a few days, state my views as to what declarations I am capable of giving, which will facilitate the disposal of the matter in Chambers.

All further proceedings at *Melbourne* will be stayed; and I think the costs of these proceedings ought to come out of the estate.

March 12. His Honour this day made declarations, of which the following are minutes:—

Following what was done in *Yelland's Case* (1), allow to Mr. *Clark* his full salary to the end of the five years.

Also allow to him a proper sum for rent and office expenses for the same period, having regard to the amount expended whilst the company was a going concern also his commission upon all goods handed over by him under the power of attorney, at invoice prices; also allow him a proper sum for the expenses of his return voyage and those of his wife; and in taking such accounts let there be a separate account of all commissions and salaries coming due to him after the winding-up.

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(1) Law Rep. 4 Eq. 350.

With these declarations refer it to the Chief Clerk to take an account of Mr. *Clark's* dealings and transactions in *Australia* as agent of the company, not disturbing any settled accounts; the Chief Clerk to certify the amount.

Solicitors for the Liquidators: Messrs. *Gregory, Rowcliffes, & Rawle.*
Solicitors for Mr. *Clark:* Messrs. *Parker, Lee, & Haddock.*

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AMALGAMATION OF COMPANIES—*Terms of Exchange of Shares—Application by Shareholder—Liability of Shareholder—Contributory.*] In March, 1865, an agreement was come to between the respective directors of two companies, *C.* and *B.*, to amalgamate, upon terms that each shareholder of company *C.* was to take a certain proportionate number of shares of company *B.* at a fixed nominal value, with other provisions; and by resolutions passed at an extraordinary general meeting of the *C.* shareholders in April, 1865, it was resolved that the agreement should be carried out, and that company *C.* should be wound up voluntarily. On the 17th of May a deed was executed carrying out this agreement.

In June, 1865, *A.*, a shareholder of company *C.*, received from the liquidators a circular letter requesting him to send his share certificates to them, to be exchanged for certificates of shares in company

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B., and enclosing for him to fill up a printed letter addressed to the liquidators, requesting them to obtain for him certificates of *B.* shares in exchange for his. This form *A.* filled up, signed, and returned, with his share certificates enclosed, to the liquidators. He afterwards received a form of notice of an intended shareholders' meeting of company *B.*, which he did not attend. He never received any letter of allotment of *B.* shares, and though the directors of company *B.* declared a dividend, he never received a dividend warrant.

In July, 1866, company *B.* was ordered to be wound up; and shortly after *A.* was informed that his name had been settled on the list of contributories, and then for the first time learned that his name had been, on the 9th of September, 1865, placed on the share register. He also found that a form of certificate of shares had been issued by company *B.* in exchange for those received from company *C.*, which bore on its face these words, "For account of the" (*C.* company) "in liquidation, subject to covenants of May 17, 1865." These certificates were forwarded by the *B.* directors to the liquidators of company *C.*, who retained them, so that *A.'s* certificate of shares in company *B.* never reached him personally.

In February, 1868, by a decree of the Court, in a suit instituted on the 10th of November, 1865, it was declared that the arrangement of March, 1865, was beyond the powers of the directors of company *C.*, and was not binding on any of the shareholders of company *C.*:—

Held, that *A.*, though his application was not commenced till January, 1867, was entitled to have his name removed from the list of contributories of company *B.*

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APPOINTMENT BY MARRIED WOMAN—*Appointment of whole Fund to Executors, and Gift of Legacies which did not exhaust the Fund—Destination of Surplus.*] By a marriage settlement a fund was settled upon such trusts as the wife should, notwithstanding coverture, by deed or will appoint; and in default of appointment, in case (which happened) there should be no issue of the marriage, in trust for such persons as should at the death of the survivor of the husband and wife be the next of kin of the wife. By her will, which purported to be in exercise of the power, the wife devised and bequeathed all her real and personal estate over which she had any disposing power to her executors therein named. She then gave several legacies, which did not exhaust the fund, and appointed executors. She died in her husband's lifetime:—

Held, that the fund was, by the appointment, all converted into the wife's general personal estate, and hence that the unexhausted portion belonged to the husband, and not to the persons entitled in default of appointment under the settlement.

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APPOINTMENT TO DEFEAT CREDITORS—*Bankruptcy—Lis pendens—2 & 3 Vict. c.* 11.] By deed, a father and son settled certain real estate to the use of the father for life, and after his decease to the use of the son, if then living, in fee; and a power was reserved to the father and son of revoking the uses and appointing new uses. By a subsequent deed, the son being at the time insolvent, the father and son revoked the old uses in favour of the son, and appointed the

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estate to such uses as the father should appoint, and in default of appointment to the use of the son absolutely. The son was afterwards adjudicated bankrupt, and a bill was filed by the creditors' assignees to set aside the latter deed as fraudulent.

Upon a motion in the cause an injunction was granted, restraining the father until the hearing from exercising his power under the deed in favour of a purchaser for value, but without interfering with the exercise of his power in favour of volunteers.

In such a case registration of the suits as a *lis pendens* under 2 & 3 Vict. c. 11, would not be a sufficient protection to creditors.
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APPORTIONMENT OF MORTGAGE DEBT—*Original Debt and Further Charge—Realty and Personalty—Apportionment.*] Real estate was mortgaged to secure £1500; and by a subsequent deed the same realty, together with other realty, was mortgaged to secure the same debt and an additional debt; and a policy of assurance and other personalty were assigned as a further security.

The mortgagor having died intestate:—

Held, that as between the administrator and heir-at-law the estate originally mortgaged was primarily liable to the payment of the £1500; and that the additional debt must be rateably apportioned as between the realty and personalty comprised in the second deed.
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APPORTIONMENT—TENANT FOR LIFE AND REMAINDERMAN—*Proceeds of Sale of Timber—4 & 5 Will. 4, c. 22.*] By a will which came into operation subsequently to the passing of the Apportionment Act, 4 & 5 Will. 4, c. 22, real estate was devised to *A.* for life subject to impeachment for waste, with remainder to *B.* for life without impeachment for waste, with remainders over. With the sanction of the Court timber on the estate was cut down and sold, and the proceeds of sale invested; and the dividends were ordered to be paid to *A.* during his life:—

Held, that the whole of a dividend which accrued due shortly after the death of *A.* was payable to *B.*, and could not be apportioned between him and the representatives of *A.*
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ASSIGNMENT OF COPYRIGHT—*Surplus Stock.*] In the absence of special contract to the contrary, the assignor of a copyright is entitled, after the assignment, to continue selling copies of the work printed by him before the assignment and remaining in his possession.
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BANKERS' COMMISSION—*Banking Account—Commission—Compound Interest.*] A banking account, which was largely overdrawn, was for the half-year ending June, 1867, charged with interest at 5 per cent., and with a gross sum of £500 for commission, in lieu of the charge of one-half per cent. previously made. The pass-book balanced on this footing was sent to the customer, and the charges were explained to his agent (the customer himself being in weak health, and unable to attend to business matters). The customer died in December, 1867, and did not raise any objection to these charges:—

Held, that the charge of £500 for commission had been acquiesced in, and was valid for the half-year ending June, 1867; but that acquiescence could not be inferred for subsequent half-years, there being nothing in the entry for the particular half-year that amounted to a contract to the same effect *in futuro*:

Held, also, that the right of the bank to charge compound interest terminated with the death of the customer; and that from that period simple interest only at 5 per cent. was chargeable on the account.

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BANKRUPT SHAREHOLDER—*Winding-up—Liability to pay subsequent Calls—Bankruptcy Act*, 1861, *s.* 154—*Companies Act*, 1862, *ss.* 75, 77.] A member of a limited company who has become bankrupt, and obtained his discharge, and whose estate has been fully administered by the assignee, remains liable, in the event of the company being subsequently wound up, to be made a contributory in respect of his shares not fully paid up, and is not exonerated under sect. 154 of the *Bankruptcy Act*, 1861, or sect. 75 of the *Companies Act*, 1862, unless the assignee has been substituted for him under sect. 77 of the *Companies Act*, and the assignee, if he does not elect to take the shares, cannot be compelled to do so, or be made liable as a contributory.

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BORROWING POWERS—*Company—Article of Association against borrowing—Overdrawn Account—Bills of Exchange by Directors.*] Money due to a bank on bills of exchange drawn and accepted by directors of a company, indorsed by the company and discounted by the bank, the proceeds of which were applied in satisfying an overdrawn account of the company with the bank, and the balance for the benefit of the company:—

Held, not to be due as upon a loan within the meaning of the articles of association, which prohibited the directors from contracting any loan beyond £500 without the consent of the shareholders.
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CANCELLATION OF SHARES—*Company — Agreement with Shareholder to cancel his Shares—List of Contributories—Past Member.*] By the articles of association of a limited company, it was provided that no contract entered into by the directors to which the assent of the company in general meeting should be given, should be afterwards impeached on any ground whatsoever.

In December, 1866, the directors entered into a contract with the Plaintiff, one of the terms of which was that the company would "forthwith" cancel all shares in the company then standing in the Plaintiff's name which were not fully paid up. The contract was assented to by the company in general meeting, and was largely part-performed, but the Plaintiff's shares were not cancelled on the 13th of February, 1867, when resolutions were passed for a voluntary winding-up, which was afterwards continued under supervision:—

Held, that the agreement for cancellation of the shares could not be impeached:

Held, further, that the Plaintiff's name ought not to be on the list of contributories in the character of a present member; and ordered accordingly, but without prejudice to any application that might be made to make him a contributory as having been a past member.
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M'Donald v. *Bryce* (16 Beav. 581) questioned 80
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Martin's Patent Anchor Company v. *Morton* (Law Rep. 3 Q.B. 306)
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CHOSE IN ACTION OF WIFE—*Husband and Wife—Judicial Separation*—20 & 21 *Vict. c.* 85, *s.* 25.] By a decree of judicial separation the wife's *choses in action* not reduced into possession at the date of the decree become, under 20 & 21 Vict. c. 85, s. 25, her absolute property as if she were a *feme sole.*

Where a wife instituted a suit to enforce her equity to a settlement of a trust fund, and while the suit was pending obtained a decree of judicial separation from her husband on the ground of cruelty, the Court ordered the fund to be paid to her, and refused the husband his costs.

Johnson *v.* Lander 228

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——— Children then living or their heirs, when ascertained 151
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———— Winding-up—Remuneration of official liquidator 102
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COMPENSATION UNDER LANDS CLAUSES ACT, *ss.* 70, 74—*Tenant for Life and Remainderman—Beneficial Lease.*] By the will of a testator, who died in 1838, land was devised to a tenant for life with remainder over in fee. In 1859 the tenant for life and remainderman concurred in demising part of the property for twenty-one years at what was then a rack rent of £84. In 1868 the demised property was taken by the *Metropolitan Board of Works*, and the purchase-money (which when invested would yield £200 a year) was paid into Court under the provisions of the *Lands Clauses Act*:—

Held, that the tenant for life was entitled only to £84 a year during the residue of the term, and that the surplus income during that time must be accumulated.

In re METTE'S ESTATE 72

COMPENSATION UNDER LONDON (CITY) IMPROVEMENT ACT, 1847 (10 *&* 11 *Vict. c. cclxxx.*)—*Assessment—Separate Interests claimed by one Person.*] Upon the construction of sects. 20 and 21 of the *London* (*City*) *Improvement Act*, 1847, a person having several distinct interests in one property, or in several distinct properties, taken under the powers of the Act, is not entitled to object to having the compensation for all such interests assessed by one jury and in one trial.

STARR *v.* MAYOR, ALDERMEN, AND COMMONS OF THE CITY OF LONDON 236

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CONSTRUCTIVE NOTICE—Right of way 427
See WAY OF NECESSITY.

CONTEMPT OF COURT—*Publication tending to influence Result of pending Suit—Publication by Solicitor.*] While a suit was pending to restrain the infringement of a patent, in which one of the issues raised was as to the novelty of the Plaintiffs' invention, a discussion having arisen in a newspaper as to the merits of the invention, the Defendant's solicitor wrote, under an assumed name, a letter, which was published in the newspaper, taking part in the discussion, and stating facts tending to disprove the novelty of the invention. The Plaintiff thereupon sent to the editor of the newspaper a letter, which the editor refused to

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insert on account of its personal imputations, in which he referred to the suit, and suggested that the writer of the letter was an interested party. The editor, not knowing that the writer was the solicitor in the suit, but knowing that he was a solicitor, subsequently published a further letter from him, disputing the novelty of the invention :—

Held, that the solicitor had been guilty of a contempt of Court in writing for publication letters tending to influence the result of the suit.

A motion to commit the publisher of the newspaper for contempt of Court in publishing the letters was refused without costs.

DAW *v.* ELEY 49

2. CONTEMPT OF COURT—*Publication tending to prejudice Result of pending Suit—Publisher of Newspaper.*] During the pendency of a suit the publisher of a newspaper published extracts from the affidavits with comments upon them :—

Held, that he had committed a contempt of Court.

TICHBORNE *v.* MOSTYN .. .. 55, n.

CONTEMPT, PROCESS OF—*Married Woman—Joint Appearance of Husband and Wife—Decree—Contempt by Wife by Breach of Injunction—Practice—Enforcing Orders—Substituted Service of Notice of Motion to commit—Separate Appearance.*] After a decree and injunction against husband and wife restraining proceedings abroad :—

Held, that a motion to commit the husband for his wife's breach of the injunction could not be sustained; that where a wife is living separate from her husband, and abroad, though she has appeared jointly with him by the same solicitor in all the proceedings in the cause, a notice of motion to commit for contempt must be served upon her personally, and that substituted service ought not to be ordered; and that either the Plaintiff or the husband may obtain an order for the wife's separate appearance; and therefore the Court refused the motion, with liberty to the Plaintiff and the husband to make such application as they respectively might be advised to obtain the separate appearance of the wife.

HOPE *v.* CARNEGIE. (1.) 254

2. ———— *Married Woman—Contempt by Wife by Breach of Injunction—Practice—Enforcing Orders—Separate Appearance.*] After a decree against a husband and wife, who were living separate, she living abroad and disobeying an order of the Court :—

Held, that the husband was entitled on motion to an order that she should appear separately in all further proceedings in the suit, and that he should not be responsible for any neglect on her part in relation to such proceedings, nor liable to any attachment or process in consequence of such neglect; and that it was not necessary to serve notice of the motion upon his wife, service of notice of such a motion on the Plaintiff being sufficient; and leave was given to the Plaintiff to serve the order and any other proceedings on the wife abroad.

HOPE *v.* CARNEGIE. (2.) 263

3. ———— *Production of Documents—Form of Summons.*] Although a Defendant is in contempt, not for non-payment of costs, but for non-compliance with orders of the Court, he is entitled to take any step required for the purposes of his defence.

A Defendant being in contempt for not having made an affidavit of documents, applied for an order that Plaintiff should make an affidavit of documents :—

Held, that he was entitled to the order, but that the affidavit and

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production by Plaintiff were to be after an affidavit and production by the Defendant.

After decree a summons requiring an affidavit as to documents by the Plaintiff must specify the points as to which discovery is sought.
HALDANE *v.* ECKFORD 425

CONTRACT BY DIRECTOR—*Specific Performance—Lease—Refreshment Rooms.*] In 1840 a railway company entered into an agreement under seal to grant *A.* a lease for ninety-nine years of the hotel to be erected at *X.* station, with power for the company to determine the lease if any complaint as to the mode of carrying on the business should not be remedied within three months after notice of such complaint. It was also agreed that the lessees "should have the occupation of the refreshment rooms at *X.* station, subject to the same restrictions and provisions as relate to the carrying on the business of the hotel, both as regards the quality and prices of provisions, and management thereof." The lease granted in pursuance of this agreement was confined to the hotel, and contained no mention of the refreshment rooms.

The refreshment rooms on the up line adjoining the hotel had been always occupied with it. In 1849 *B.*, a director of the company (head of a firm at *X.*, who were assignees of the lease of the hotel), erected at a cost of £200 refreshment rooms on the down line pursuant to an alleged agreement with the company that his firm should have a lease of such refreshment rooms for a term co-extensive with the lease of the hotel. The only evidence of such agreement was this minute in the books of the company: "A ground rent of £6 per annum was ordered to be fixed for the new refreshment rooms built by the lessees at the down station in *X.*"

In 1867 the company gave notice to *C.*, the assignee from *B.* of the lease and occupier of both refreshment rooms, that their arrangements with reference to a new station (recently erected) at *X.* would involve the determination of his tenancy of the existing refreshment rooms:—

Held, 1. As to the refreshment rooms on the down line, that no agreement of which the specific performance could be granted was proved, and that in any case the Court could not enforce specific performance of an agreement by a director with the company for the benefit of himself or his firm. 2. As to the upper refreshment rooms, that the occupation was not determinable at the mere will of the company, and that *C.* was entitled to have the agreement of 1840 carried into effect by having a deed executed to him as the assign of *A.*, with all proper provisions granting the right of occupation of the upper refreshment rooms to him his assigns and nominees, being tenants of the hotel, subject to the provisions and restrictions contained in the agreement.
FLANAGAN *v.* GREAT WESTERN RAILWAY COMPANY 116

CONTRACT FOR PARTNERSHIP—*Specific Performance—Demurrer allowed—Cairns' Act—Damages.*] As a general rule, the Court will not decree specific performance of a contract for partnership.

Where the Plaintiff's appropriate remedy is an action at law, where there are no legal difficulties in his way which the Court can remove, and where there has been no part performance, the Court will not decree specific performance of a contract for partnership.

In a case in which, before *Lord Cairns' Act*, the Court would not have interfered, it will not, since that Act, assess damages.
SCOTT *v.* RAYMENT 112

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——— Set-off—Calls against debenture 240
See SET-OFF IN WINDING-UP.

CONVERSION—*Will—Real Estate—Personal Estate in Expectancy.*] A testator devised his real estate to trustees upon trust to pay the rents and profits thereof to his wife during her life, if she should so long continue his widow; and from and after her death or second marriage he declared that they should stand possessed thereof upon trust for his children who should be then living, and their respective heirs, as tenants in common, but subject to a power for the trustees, if they should in their discretion think fit so to do, to sell the said real estate; and in the event of such sale the trustees were to pay, divide, and apply the proceeds unto and among his children who should be then living, in equal shares. During the lifetime of the testator's widow one of his children assigned all his personal estate in possession, remainder, or expectancy, to trustees for the benefit of his creditors. Upon the widow's death the trustees of the testator's will, in exercise of the power therein contained, sold the real estate:—

Held, that the child's share of the proceeds did not pass to the trustees of the creditors' deed.
In re IBBITSON'S ESTATE 226

2. ——— *Will—"Public Funds or Government Securities"—Long Annuities.*] A testator gave his residuary estate to trustees in trust to convert into money such parts thereof as should not at his decease consist in money or be invested in any of the public funds or government securities, and to invest the same in such public funds or government securities as to them should seem most advantageous, and to pay the interest, dividends, and annual proceeds of such residue to his children in equal shares for their lives, and after their deaths upon other trusts:—

Held, that long annuities, of which the testator died possessed, were within the exception from the trust for conversion, and that the tenants for life were entitled to enjoy them *in specie*.
WILDAY *v.* SANDYS 455

——— Appointed fund into general personal estate 310
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COSTS OF ADMINISTRATION SUIT—*Partial Distribution of Estate —Costs.*] The executors of a testator accounted for the residuary estate to such of the residuary legatees as were adults; and, after setting apart a portion of such estate as an indemnity fund against certain possible claims, they paid the adult legatees their shares of the residue, they retained their own shares, and they invested the share of each infant legatee in their own names and the name of the infant entitled thereto. Afterwards an administration suit was instituted on behalf of certain of the infants, the result of which was to establish the substantial accuracy of the accounts rendered by the executors:—

Held, that the costs must be paid out of the undistributed residuary estate; that neither the residuary legatees who had been paid their shares, nor, in the first instance, the executors, were to receive any costs unless they respectively accounted for the shares they had received or retained, and contributed to the costs; but that after payment of the costs of the Plaintiffs, and any other parties entitled thereto, out of the indemnity fund (which had been brought into Court), the surplus thereof should be paid to the executors towards payment of their costs.

In re TANN. TANN *v.* TANN. GRAVATT *v.* TANN. (2.) .. 436

2. ——— *Personal Estate insufficient—Real Estate specifically devised—Real Estate descended.*] A testator devised the whole of his real estate specifically to trustees upon certain trusts, the will containing no residuary devise. Some of the gifts of the realty were held void for uncertainty, and lapsed to the heir-at-law. The personal estate was insufficient to pay the debts:—

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Held, that the costs of administering the estate must, as between the heir-at-law and the specific devisees, be borne primarily by the real estate descended.

Row *v.* Row 414

COSTS OF PARTITION—*Agreement for Partition—Death of Co-owner.*] *A.* and *B.* being entitled to fourteen freehold houses as tenants in common in undivided moieties, entered into an agreement for partition, by which *A.* was to take and hold in severalty seven of the houses, and *B.* the other seven. Both died before a deed of partition was executed. *A.*, who was the survivor, specifically devised the seven houses agreed to be held in severalty by him, but allowed the legal estate in one moiety of the other seven houses to devolve on his heir-at-law:—

Held, that the costs of carrying the agreement for partition into effect (including the costs incurred in getting in the outstanding legal estate) must be borne by the devisees of *A.*, and not by his personal estate.

In re TANN. TANN *v.* TANN. GRAVATT *v.* TANN (1.) .. 434

COSTS UNDER LANDS CLAUSES ACT—*Practice — Lands Clauses Act, ss.* 70, 74—*Tenant for Life and Remainderman—Costs of Remainderman's Appearance.*] Where purchase-money has been paid in under the *Lands Clauses Act*, in respect of lands let on lease at rank-rent, and settled to the use of a tenant for life, with remainder over, it is proper to make the remainderman a Respondent to a Petition by the tenant for life for investment and payment of dividends, although the interest of the proposed investment of the money will be less than the rent reserved by the lease.

In re CRANE'S ESTATE 322

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COVENANT—Not to sell spirituous liquors 523
See COVENANT NOT TO SELL SPIRITUOUS LIQUORS.

———— Settlement of future property 231
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COVENANT NOT TO SELL SPIRITUOUS LIQUORS—*Grantor and Grantee—Lease—Notice of Covenants in Original Deed of Grant—Sale of Spirituous Liquors—Injunction — Practice — Answer— Co-Defendants.*] A lessee is bound to inquire into, and is fixed with notice of, all covenants into which his lessor has entered in respect of the land.

In 1854, a dwelling-house and shop were conveyed by the Plaintiff to the Defendant *A.* in fee, in consideration of the payment by *A.* to the Plaintiff of a perpetual yearly rent-charge; and the conveyance contained a covenant by *A.*, his heirs, executors, and administrators, with the Plaintiff, his heirs and assigns, that he and they would not use or occupy, or permit to be used or occupied, the building "as an inn, public-house, or tap-room, or for the sale of spirituous liquors, or ale, or beer." In 1857, the Defendant *B.* became tenant from year to year of the house, using and occupying it for the business of a grocer. In 1862, *A.* demised the house and shop to *B.* for twenty-one years at a yearly rent; the only restrictive covenant being a covenant by *B.* that "no offensive business or occupation or nuisance shall be carried on or committed on the said premises, and that the same shall be used as a dwelling-house and shop only." In 1866, *B.*, as the agent of a firm of *London* wine merchants, began, in the course of his business as a grocer, to sell on the premises wine and spirits, but in bottle only.

On bill for an injunction against *A.* and *B.*, it was found, as the result of the evidence, that *B.* had no knowledge of the covenant in the original deed :—

Held, notwithstanding, that he was put upon inquiry, and was fixed with constructive notice of the covenant:

Held, further, that the words, "for the sale of spirituous liquors," did not prevent the sale of wine, but extended to the sale of spirituous liquors in bottle; and injunction granted accordingly.

Bill dismissed against *A.* with costs.

A Plaintiff cannot, without giving notice, read the answer of a Defendant against a co-Defendant.

Feilden *v.* Slater 523

COVENANT TO SETTLE—*Marriage Settlement—Covenant to settle Future Property—Tontine Debentures—What constitutes Future Property.*] A marriage settlement contained a recital of an agreement to settle all personal property which the wife should at any time during the intended marriage become entitled to, and a covenant by the husband and the wife for the settlement of all personal property which the wife, or the husband in her right, at any time or times during the marriage should become possessed of or entitled to by transmission, gift, or otherwise, and whether in possession or expectancy.

Another marriage settlement contained no recital of any agreement as to the settlement of future property, but a covenant by the husband and wife to settle any personal property of the value of £200 or upwards which should at any time or times during the coverture be given or bequeathed to, or in any manner vest in, the wife.

In each case the wife was, under the will of her mother, entitled at the date of the settlement to the beneficial interest in an undivided share of four Irish tontine debentures. The holder of one of these debentures was entitled during the life of a person therein named to an annuity of £7 10s. Irish currency, and also to a proportionate share of all other annuities under similar debentures which might cease to become payable to the holders thereof by reason of the death of the *cestuis que vie* therein named. At the dates of the settlements the debentures were of small value; but ultimately large sums became payable thereunder. No mention was made of them in the settlements :—

Held, that no part of the annuities payable thereunder was included in either of the above-mentioned covenants.

In re Browne's Will 231

CREDITOR HOLDING SECURITY — *Creditors' Deed—Guarantee—Surety—Dividend on full amount of Debt.*] A banker permitted a customer to overdraw his account upon having a limited guarantee from a surety, which provided that all dividends, compositions, and payments received on account of the customer should be applied as payments in gross, and that the guarantee should apply to and secure any ultimate balance that should remain due to the bank. The customer, when indebted to the bank more than the amount of the guarantee, compounded with his creditors, and the surety paid the amount of his guarantee :—

Held, that the bank was entitled to receive dividends upon the full amount of their debt until by means of such dividends and the amount received under the guarantee they should have been paid the whole sum due.

Midland Banking Company *v.* Chambers 179

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DEFECTIVE EXECUTION—*Contract of Sale to Railway Company—Power to appoint by Deed—Conversion.*] Under a settlement certain lands stood limited to such uses as *D.* should by deed appoint, and subject thereto to the use of *D.* and the heirs of his body, with remainders over. *D.* was also absolutely entitled in fee to certain other lands. A railway company required part both of the settled estate and of the lands to which *D.* was absolutely entitled. By an agreement not under seal made between *D.* and two of the directors of the company, after reciting that *D.* was owner of certain lands part of which, being those specified in the schedule thereto, were required by the company, and that the purchase-money and compensation to be paid to *D.* in respect of the taking of such lands had not been ascertained, and that it had been agreed to refer these matters to arbitrators and an umpire therein named, the parties thereto bound themselves to abide by the determination of the arbitrators and umpire. The schedule comprised the lands required by the company, without any distinction as to the titles under which they were respectively held: and a single sum was awarded to *D.* as the purchase-money for the whole thereof. Before any conveyance was executed, *D.* died:—

Held, that the agreement operated in equity as an execution of the power of appointment in the settlement: and that the purchase-money was payable to the legal personal representative of *D.* as part of his personal estate.
In re DYKES' ESTATE 337

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2. DEFECTIVE EXECUTION—*Defective Execution or Non-Execution —Intention to execute.*] *A.* having in the events that happened power to appoint funds amongst her children by deed, or by her last will in writing, or any writing purporting to be or being in the nature of her last will, or any codicil thereto, to be signed and published in the presence of, and to be attested by, two credible witnesses, died intestate; but left in an envelope, addressed to her son, an unattested memorandum (signed by herself, and dated eight years before her death), "for my son and daughters. Not having made a will, I leave this memorandum, and hope my children will be guided by it, though it is not a legal document. The (funds) I wish divided as follows:"—(amongst her children, followed by bequests out of another fund, and a gift of the residue, and concluding,) "this paper contains my last wishes and blessings upon my dear children, and thanks for their love to me:"—

Held, that this memorandum shewed no intention to execute the power, and, consequently, that the Court could not remedy any defects in execution so as to give validity to it as an appointment.

GARTH *v.* TOWNSEND 220

DEPOSIT OF DEEDS—*Second Mortgagee without Notice—Purchase of Prior Incumbrance—Priorities—Custody of Title Deeds—Production.*] *J. T.* being the equitable owner of a moiety in lands, under the will of a testator who had, in 1806, purchased the entirety, in 1812 conveyed the moiety upon trust to pay an annuity, and subject thereto, for himself in fee. In 1823, he purchased the legal fee simple in the second moiety. By a settlement in 1825 he charged the two moieties with a sum to be raised at his death. In 1830 he again mortgaged the first moiety only, and he, or his solicitor (who was also a trustee of the settlement), deposited with the second mortgagee the purchase deeds of 1806, and the deeds of charge of 1812. In 1832 the second mortgagee first had notice of the settlement, and in 1835 she bought in the annuity. The annuitant died in 1837. In 1851 the trustee of the settlement died. Since 1832 the second mortgagee had been in possession. *J. T.* died in 1866:—

Held, that a title by adverse possession had not been acquired by the second mortgagee:

Held, further, that the second mortgagee had not, by purchase of the annuity, acquired priority over the first mortgagee:

Held, further, that possession of the title deeds did not give the second mortgagee priority:—

Held, further, that the second mortgagee could not be deprived of the custody of the deeds; but upon a sale being decreed, the deeds were ordered to be produced, at the instance of the parties interested in the second moiety, who would be at liberty to take attested copies.

Observations on the form of the order.

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DERIVATIVE INTEREST—Election—Legacy—Administrator .. 291
See ELECTION BY ADMINISTRATOR.

DESCENT EX PARTE MATERNÂ—*Customary Freehold—Breaking the Descent ex parte Maternâ.*] *B.* conveyed customary freeholds, which he had inherited from his mother, to *N.* absolutely, and *N.*, after surrender and admittance, executed on the same day a deed of declaration of trusts for such person as *B.* should by deed or will appoint, and in default for *B.* and his heirs, this process being necessary according to the custom to give *B.* the power of devising. *B.* died intestate:—

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Held, that the descent had not been broken, and that the heir of the testator *ex parte maternâ* was entitled.
NANSON *v.* BARNES 250

DESIGNATIO PERSONÆ 170
See ILLEGITIMATE CHILDREN. 1.

DEVASTAVIT—Executorship account—Executor applying money to his own purpose—Liability of bankers 286
See EXECUTORSHIP ACCOUNT.

DIRECTOR—Contract with company—Specific performance 116
See CONTRACT BY DIRECTOR.

DIRECTORS, Unauthorized payment by—Right of official liquidator to recover 334, 442
See UNAUTHORIZED PAYMENT BY DIRECTORS. 1, 2.

DIRECTORY, COPYRIGHT IN—*Paid-for Insertions—Advertisements.*] In a trades directory, those persons who chose to pay for the privilege got their names printed in capital letters, with additional descriptions of their trade or business, called "extra lines":—

Held, that such payment had not the effect of making the information common property, so as to enable the compiler of a rival directory to reprint it from slips cut from the first, even where the persons whose names were so printed had been applied to to verify the information contained in the first directory, and had not only authorized but had actually paid for the insertion of their names in the second, with the distinctive features of capital letters and extra lines.

Injunction granted, but not to extend to advertisements distinct from the body of the work.
MORRIS *v.* ASHBEE 34

DISCLAIMER by sub-mortgagee—Foreclosure 399
See SUB-MORTGAGE.

DISMISSAL FOR WANT OF PROSECUTION—*Practice—Motion to dismiss—Voluntary Assignment.*] A registered deed of assignment in trust for creditors executed by Plaintiff pending the suit does not cause an abatement as upon bankruptcy, so as to deprive the Defendant of his right to move to dismiss for want of prosecution.
PICKERING *v.* CAPE TOWN RAILWAY COMPANY 224

DISSOLUTION OF MARRIAGE—Suit for injunction to restrain—Condonation of adultery 185
See SEPARATION DEED. 1.

DIVORCE COURT—Injunction to restrain suit in—Condonation of adultery 185
See SEPARATION DEED. 1.

DOWER—Annuity in lieu of—Election 494
See SEPARATE ELECTION.

"DUE AND PAYABLE"—*Settlement—Construction—Vested Interest—Gift over.*] By a marriage settlement trustees were directed to hold a sum of stock, and the income, after the death of the survivor of husband and wife, unto and amongst a child (*J.*) of the husband by a former marriage, and all the children of the then intended marriage, in equal shares, and in case either or any of them should happen to be dead leaving issue, unto the issue of such one or more which should be then dead, equally to be divided amongst them or their issue respectively, to each being a son at twenty-one, and to each being a daughter at twenty-one or marriage; and until their respective shares should become "payable as aforesaid," upon trusts as to income for maintenance and education. In case *J.* or either or any of such children of

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the marriage should die without issue before his, her, or their share should become "due and payable," the share was to be paid and divided unto and amongst the survivors and survivor, and the issue of any one or more of them who might happen to be dead leaving issue, in equal shares, in manner aforesaid, and when and as his, her, or their original or proper share or shares should become "due and payable." In case at the time of the decease of the survivor of husband and wife there should be neither *J.*, nor any child or children of the marriage, nor any issue of *J.*, or of such child or children, living, or if there should be any then living, if all of them should die before his, her, or their share or shares were "payable, then" there was a gift over. In case the trustees should see it necessary or requisite for a child or the issue of a child to have his, her, or their share or shares paid, assigned, or transferred to him, her, or them before the expiration of "the respective times hereinbefore limited for the payment and division thereof respectively," they were empowered to pay or assign and transfer the same accordingly.

J. died without leaving issue in the lifetime of the tenant for life :—

Held, that the provision for the issue of a deceased child relieved the Court from the necessity of applying the rule in *Emperor* v. *Rolfe* (1 Ves. Sen. 209); and that, upon the construction of the whole settlement, the share of *J.* was divested, and went over to the survivors.

Observations on *Mocatta* v. *Lindo* (9 Sim. 56).

In re WILMOTT'S TRUSTS 532

EASEMENT—Right of way—Way of necessity 427
See WAY OF NECESSITY.

ELECTION—Appointment in will of married woman—Failure of appointment by subsequent event 215
See WILL OF MARRIED WOMAN.

———— Husband administrator to his wife 291
See ELECTION BY ADMINISTRATOR.

———— Separate right by several next of kin 494
See SEPARATE ELECTION.

ELECTION BY ADMINISTRATOR—*Will—Legacy—Derivative Interest—Administrator.*] A testator, being entitled under a settlement, subject to a life interest, to a moiety of a fund, by will, after reciting (erroneously) that he was, under the settlement, "subject to the trusts therein contained," entitled to the whole, purported to bequeath the whole, and to give one moiety to the husband of the lady who was really entitled under the settlement to a moiety of the fund :—

Held, that the husband, who had become his wife's administrator, was not bound to elect between the legacy and his wife's moiety.

GRISSELL *v.* SWINHOE 291

ENJOYMENT IN SPECIE—Long annuities 455
See CONVERSION. 2.

EQUITABLE TITLE—*Legal Estate—Conveyance.*] Upon a sale under the order of the Court, the purchaser will not be compelled to accept an equitable title without the legal estate being got in, except, perhaps, in a case where a dry legal estate is outstanding in an infant.

FREELAND *v.* PEARSON 246

EVIDENCE—*De bene esse*—Administration suit 421
See EVIDENCE DE BENE ESSE.

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EVIDENCE—Presumption of death within seven years 498
See PRESUMPTION OF DEATH.

EVIDENCE DE BENE ESSE—*Practice—Administration Suit—Second Suit by a Claimant to have Evidence taken de bene esse—Examination and Cross-examination of Witness—Application to have de bene esse Evidence read in Administration Suit refused.*] Where a bill had been filed to administer the real and personal estate of an intestate, the object being to ascertain his co-heirs and next of kin, and after decree made, but before it was drawn up, a person claiming to be a co-heir and one of the next of kin, not a party to the first suit, had filed a bill against all the parties to the first suit also praying administration, with the object of having the evidence of a witness taken *de bene esse*, and the witness had been examined and cross-examined—an application that the evidence taken *de bene esse* in the second suit might be read in the first suit was refused.
HILL *v.* HIBBIT 421

EXECUTOR—Executorship account at bank—Devastavit—Mortgage to bank 286
See EXECUTORSHIP ACCOUNT.

EXECUTORSHIP ACCOUNT—*Administration—Mortgage to Bank.*] *A.* being indebted at his death to a bank for a sum, as a security for which he had deposited with them the title deeds of an estate, by his will empowered his executors to charge his real estates in aid of his personal estate. His widow and sole executrix was allowed by the bank to draw upon "*A.'s* Executorship Account," and had deposited the title deeds of part of *A.'s* real estate as a security for the increased amount due to the bank and future advances. The moneys were drawn out from time to time in small sums, and applied by the widow for her own personal expenses and in carrying on *A.'s* farm, as well as in payment of his debts:—

Held, that, in the absence of any notice to the bank that *A.'s* widow was committing a breach of trust in applying the money for her own purposes, they were entitled in a suit for administering *A.'s* estate to prove as creditors for the amount of their advances on the executorship account secured by the deposit of title deeds made by *A.'s* widow.
FARHALL *v.* FARHALL 286

EXONERATION—Mortgaged estates—Two estates subject to same mortgage 371
See MORTGAGE OF TWO ESTATES.

FIRM OF SOLICITORS—*Solicitor and Client—Liability of innocent Members of the Firm—Misappropriation.*] Money received by one member of a firm of solicitors in the course of the management and settlement of the affairs of a client of the firm, is money paid to the firm in the course of their professional business; and, consequently, the members of the firm are liable to make good any loss occasioned by the negligence or dishonesty of their partner by whom such money was received.
EARL OF DUNDONALD *v.* MASTERMAN 504

FOREIGN LAW—Act of Limitations for *India* 302
See LIMITATIONS, ACT OF, FOR INDIA.

FORFEITURE OF SHARES—*Company—Bill to cancel Forfeiture—Bill by Shareholder on behalf of himself and all other Shareholders—Tender under Protest—Pleading—Separate Answers.*] A shareholder in a company may file a bill on behalf of himself and all other shareholders to annul the forfeiture of his shares.

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A shareholder in a company formed for working certain patents owed £40 to the company in respect of calls on his shares. He sent a cheque for that amount to the secretary, along with a letter, which began thus:—"Herewith I forward a cheque for £40, being the amount of the call made upon me for twenty shares which I hold in the company." Then followed a protest against the payment, on the ground, amongst others, that certain patents which had been sold to the company were invalid; and the letter concluded in these terms:—"I request that you will enter this my protest in the records of the company, and further, that this money be held in trust by the directors (each of whom I shall hold responsible for repayment of the same) until the question of the vendors' patent rights has been settled":—

Held, that this was a good tender of payment; and that the concluding words of the letter imposed no obligation or liability on the directors.

SWENY *v.* SMITH 324

FRAUD—Solicitor misapplying money 504
See FIRM OF SOLICITORS.

FRAUDULENT CONVEYANCE—13 *Eliz. c.* 5—*Setting aside Conveyance at Suit of Creditor—Form of Decree—Frame of Suit.*] In order to entitle a creditor of a living debtor to set aside a fraudulent conveyance under the 13 Eliz. c. 5, it is not necessary that the creditor should have any lien or charging order on the property comprised in the conveyance; but in the absence of such lien the Court will not apply the property in satisfaction of the creditor's claim.

Semble, a bill to set aside such a conveyance ought to be on behalf of all the creditors of the debtor.

REESE RIVER SILVER MINING COMPANY *v.* ATWELL 347

2. ———————— 13 *Eliz. c.* 5—*Subsequent Creditors.*] A trader, by a post-nuptial settlement, settled all his property of every description, both present and future, upon trust for his wife for her separate use for life, remainder for himself for life, remainder for his children, reserving the control of his stock in trade to himself. Five years later he became bankrupt:—

Held, at the suit of his assignees, that the settlement was void under 13 Eliz. c. 5, although it did not appear that *A.* was indebted at the time of its execution, except on mortgages of part of the settled property, which had since been satisfied.

WARE *v.* GARDNER 317

FREE SCHOOL—Scheme—Capitation fees—Selection for proficiency .. 353
See GRAMMAR SCHOOL.

FREEHOLD GROUND RENTS—*Trustee—Power to invest in Land.*] Trustees having power to invest money in the purchase of lands or hereditaments in fee simple in possession, may invest in the purchase of freehold ground rents.

In re PEYTON'S SETTLEMENT TRUST 463

FUTURE PROPERTY—What constitutes—Covenant to settle 231
See COVENANT TO SETTLE.

GIFT—Original or substitutional—Gift to unborn person with remainders over 363
See UNBORN ISSUE.

GIFT OF "OTHER PROPERTY"—*Will—Construction—General Gift of Property—Real Estate.*] A specific devise of real estate was followed by a devise and bequest of all the testator's other property whatsoever and wheresoever to trustees upon trusts which were expressed

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in terms more appropriate to personalty than to realty. The testator was not, at the date of his will, entitled to any real estate other than that specifically devised, but he subsequently became entitled to real estate of great value:—

Held, that such subsequently acquired real estate passed by the will. *Coard* v. *Holderness* (20 Beav. 147) distinguished.

LLOYD *v.* LLOYD 458

GIFT TO "CHILDREN THEN LIVING OR THEIR HEIRS"—"*Heirs*"—*Next of Kin when ascertained.*] A testator, by his will, directed that a sum of stock should after the death of his wife be divided among his "children then living, or their heirs." Two of the children were dead at the date of the will; three survived the testator and died in the lifetime of his wife; and two survived her:—

Held, (1), that the "heirs" of the children who predeceased the wife (including the two who were dead at the date of the will) were entitled to share in the fund along with the children who survived her; (2), that by "heirs" were meant the statutory next of kin of the children; (3), that such next of kin were to be ascertained, in the case of the children who survived the testator, at the time of the death of each child; but in the case of the children who predeceased the testator, at the time of the testator's death.

Hamilton v. *Mills* (29 Beav. 193) distinguished.

In re PHILPS' WILL. 151

GIFT TO CHILDREN WITH BENEFIT OF SURVIVORSHIP—*Will—Construction—Gift to A. for Life with Remainder to his Children, to be paid at Twenty-one, "with Benefit of Survivorship."*] A testator gave a fund to trustees upon trust to pay the income to *A.* during his life, and after the decease of *A.* leaving issue, upon trust to pay, apply, assign, and transfer both principal and interest to and amongst all and every the child and children of *A.*, equally to be divided between them, and if but one, then to such only child, to be paid to them, if sons, at twenty-one, and if daughters at that age or marriage, "with benefit of survivorship;" and in case there should be no child or children of *A.* at the time of his death, or if all and every such child or children should die before attaining twenty-one or marriage, then over. *A.* had eight children, of whom three died infants in their father's lifetime, two attained twenty-one and died in his lifetime, and three attained twenty-one and survived him:—

Held, that the two children who attained twenty-one and died in their father's lifetime took vested interests, and that their representatives were entitled to share in the fund along with the children who survived their father.

M'Donald v. *Bryce* (16 Beav. 581), and *Daniel* v. *Gosset* (19 Beav. 478) questioned.

CORNECK *v.* WADMAN 80

GIFT TO SURVIVORS OR SURVIVOR—*Death before Tenant for Life—Divesting Clause.*] Bequest to *A. B.* for life, and after her decease to eight persons in equal shares, their interests therein to be vested from the time of the testator's decease; and in case of the death of any of the eight legatees before the tenant for life, the share or shares of him, her, or them so dying to be paid to the survivors or survivor equally. The eight residuary legatees survived the testator, but all died before the tenant for life:—

Held, that survivorship was to be referred to the death of the tenant for life; and that as none of the residuary legatees survived her, the

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divesting clause had no operation, and each of the residuary legatees took his original gift.

Crowder v. *Stone* (3 Russ. 217) questioned.

MARRIOTT *v.* ABELL 478

GIFT TO WIFE FOR HERSELF AND CHILDREN—*Will—Construction—Gift of Personalty to Wife absolutely "for the benefit of herself and Children"—Joint Tenancy—Reversionary Interest—Nonseverance by marriage of female joint-tenant.*] Testator, by will, gave all his estate (which consisted wholly of personalty, or of real estate distributable as personalty) to his wife absolutely, "for the benefit of herself and children;" and appointed her executrix of his will. He left his wife and six children surviving. The widow proved the will, and died. During her lifetime one of the children, a daughter, married and died:—

Held, that the children took as joint tenants, and, *semble*, that the wife took only an estate for life:

Held, further, that the daughter did not, by her marriage, sever the joint tenancy.

ARMSTRONG *v.* ARMSTRONG 518

GRAMMAR SCHOOL—*Charity—Education—Clothing—Selection for Proficiency—Capitation Fees.*] A charity was founded in 1626 for the purpose of clothing eight poor boys of the town of *E.*, and causing them "to be put to some petty school to the end they might learn to read English, and there to be so kept until they should attain the age of thirteen years, thereby to keep them from idle and vagrant courses, and also instruct them in some part of God's true religion":—

Held, that the primary object of the charity was the education of very poor persons.

The income of the charity having greatly increased, a scheme was sanctioned containing the following provisions:—

The establishment of an elementary school confined to the sons of inhabitants of *E.*, and of a superior school not confined to the sons of inhabitants of *E.*

The payment of capitation fees by boys attending both schools.

The gratuitous education of a certain number of boys in both schools, those in the superior school to be selected by competitive examination, those in the lower school for proficiency, or good conduct, or for poverty, at the option of the trustees.

An allowance of clothing for twenty boys attending the lower school, to be selected for merit, regular attendance, or good conduct, or for poverty, at the option of the trustees.

In re LATYMER'S CHARITY 353

GUARANTEE—Account at bankers—Creditors' deed—Dividend for full amount 179

See CREDITOR HOLDING SECURITY.

GUARDIAN—Infant shipowner—Power to sell or mortgage 95

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HEIR—*Ex parte maternâ* 250

See DESCENT EX PARTE MATERNÂ.

HEIR-AT-LAW—Costs of administration suit—Descended or devised estate 414

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"HEIRS"—Gift of stock to "children or their heirs" read "next of kin" 151
See Gift to "Children then living or their Heirs."

HUSBAND AND WIFE—Appointment by wife to executors—Fund converted into her general personal estate—Rights of husband as administrator 310
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——————— Covenant to settle future property 231
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——————— Election by husband administrator of his wife 291
See Election by Administrator.

——————— Infant married woman—Petition for settlement .. 484
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——————— Power of appointment by wife—Failure of appointment by subsequent event—Election 215
See Will of Married Woman.

——————— Process of contempt against wife for breach of injunction—Separate appearance of wife 254, 263
See Contempt, Process of. 1, 2.

——————— Separate estate—Liability of wife—Calls .. 16
See Separate Estate.

——————— Separation deed—Condonation of adultery .. 185
See Separation Deed. 1.

——————— Separation deed—No separation taking place .. 343
See Separation Deed. 2.

——————— Wife's *chose in action*—Judicial separation .. 228
See Chose in Action of Wife.

ILLEGITIMATE CHILDREN—*Will—Designatio Personæ.*] An illegitimate child, or illegitimate children *in esse* as a class, may take under a gift to a child or children as a class, if it appears certainly from the context, or proper evidence, that they are the persons meant by the word "child" or "children."

But illegitimate children unbegotten at the time of the testator's death cannot under any circumstances be entitled under such a description.

Observations on *Pratt* v. *Mathew* (22 Beav. 328), *Beachcroft* v. *Beachcroft* (1 Madd. 430), and other cases.

Holt *v.* Sindrey .. .. : 170

2. ——————— *Bequest to A., by her Maiden Name, and her two youngest Daughters.*] Illegitimate children of an unmarried sister of the testator described in the will by her maiden name:—

Held, entitled to shares in a legacy to her "and her two youngest daughters."

Savage *v.* Robertson 176

IMPLICATION—Reservation of right of way 427
See Way of Necessity.

INDIAN LAW—Act of Limitations 302
See Limitations, Act of, for India.

INFANT—Married woman—Petition for settlement 484
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INFANT MARRIED WOMAN—*Petition for Settlement*—18 & 19 *Vict. c.* 43.] Upon the Petition, by next friend, of an infant married woman, not a ward of Court, for a settlement of her property:—
Held, that the Court has no power over the property of an infant, not being a ward of Court, who marries after attaining the age at which she is capable of contracting marriage; and that no jurisdiction is in such a case conferred by the Act 18 & 19 Vict. c. 43.
In re POTTER 484

INFANT SHIPOWNER—*Merchant Shipping Act* (17 & 18 *Vict. c.* 104), *s.* 99—*Guardian of Infant Shipowner—Power to sell or mortgage.*] The guardian of a registered infant owner of a ship, has no power under the *Merchant Shipping Act*, s. 99, to sell or mortgage the ship on behalf of the infant.
MICHAEL *v.* FRIPP 95

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——— Sale of spirituous liquors 523
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——— Suit for divorce—Condonation of adultery 185
See SEPARATION DEED. 1.

INJURY TO REPUTATION—*Injunction—Damage to Property.*] The Court has jurisdiction to restrain the publication of any document tending to the destruction of property, whether consisting of money or of professional reputation by which property is acquired.
The publication of a notice stating that the Plaintiff was a partner in a bankrupt firm restrained.
DIXON *v.* HOLDEN 488

INSOLVENCY—Securities for bills of exchange—Company—*Ex parte Waring* (19 Ves. 345) 201, 449
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See RELEASE OF SURETY.

INVESTMENT—Power of—Freehold ground-rents 463
See FREEHOLD GROUND-RENTS.

"ISSUE" restricted to children 472
See "ISSUE" READ "CHILDREN."

"ISSUE" READ "CHILDREN"—"*Leaving Issue*" *read* "*Having had Issue.*"] A testator gave the residue of his estate to trustees to invest and pay one-fourth of the income to each of his four sisters for life, and when and so soon as any of them should die, "without leaving issue," then he directed that the share in the trust moneys of her or them so dying "without issue" should be divisible among his surviving sisters, and the issue of any who might then be dead, in equal shares, but such

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issue to take only their respective "parent's" share; and when and so soon as any of his sisters should die and "leave issue," then upon trust to call in the share of her or them so dying "leaving issue," and pay the same unto such respective issue, if more than one "child," equally:—

Held, that "issue" here meant "children," and that "leaving issue" meant "having had issue."

One of the testator's sisters died, having had two children, one of whom survived her mother, and the other died in her mother's lifetime, leaving a family:—

Held, that a moiety of her mother's share vested in the daughter who died in her lifetime, and consequently passed to her family.

Sheffield v. *Kennett* (27 Beav. 207; 4 De G. & J. 593) observed upon.

BRYDEN *v.* WILLETT 472

JOINT TENANCY—Gift to wife for herself and children — Severance by marriage 518
See GIFT TO WIFE FOR HERSELF AND CHILDREN.

JUDICIAL SEPARATION—Wife's *chose in action* 228
See CHOSE IN ACTION OF WIFE.

JURISDICTION—Injunction—Injury to reputation 488
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———— Rolt's Act—Partition suit 296
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———— Rolt's Act—Title to land 197
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LANDS CLAUSES ACT, ss. 10, 11—Sale in consideration of rent-charge 409, 439
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LIEN—Creditor setting aside voluntary conveyance—Form of decree .. 347
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—— Solicitor—Property recovered in suit—Foreclosure 83
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LIFE ASSURANCE—*Suicide, Condition against—Exception of bonâ fide Interests in other Persons—Assignment to Assurance Company.*] An assurance company advanced money to *W.* on a mortgage of real security, and on his effecting a policy on his life in their office for the amount of the loan, which was deposited with the company as collateral security. The policy contained a condition that if the assured died by his own hands, by the hands of justice, or by duelling, the policy should be void, except to the extent of any *bonâ fide* interest therein which at the time of such death should be vested in any other person or persons for a sufficient pecuniary or other consideration. *W.* committed suicide under temporary insanity while the policy was in the hands of the company:—

Held, that the company and the assured stood in the same position as if the policy had been mortgaged to any third person; that the company came within the exception in the condition; and therefore that the policy was valid to the extent of the mortgage debt due to them at the death of the insured.

WHITE *v.* BRITISH EMPIRE MUTUAL LIFE ASSURANCE COMPANY 394

LIMITATIONS, ACT OF, FOR INDIA—(*No. XIV., of* 1859)—*Foreign Law—Lex Loci or Lex Fori—Claim in respect of immoveable Property—Tenancy in Common—Common Agent—Presumed Grant—Legal Ouster.*] Tenants in common of house property in *Calcutta*, under the will of a testator who died in 1803, became, in 1825, reduced to two. The property had all along been considered as leasehold, in which view one of the surviving co-tenants would, in the events that had happened, be entitled to five-ninths and the other to four-ninths of the property; and the rents had been received by a common agent, and shared accordingly. In 1827 the supposed owner of the four-ninths settled her share, describing it as a moiety. This description was, nevertheless, treated as an error, and the rents were continued to be received as before, and to be shared in the same proportions, until 1864, when it was discovered that the property was freehold, upon which footing the supposed owner of the five-ninths would really be entitled to four-fifths, and the supposed owner of the four-ninths to one-fifth only.

In 1859 an Act of Limitations for *India* was passed, which provides that no suit for the recovery of immoveable property shall be maintained in any Court within the British territories in *India* unless the same, if instituted after two years from the passing of the Act, be instituted within twelve years from the time when the cause of action arose.

The property having been sold, and the proceeds paid into Court, the owner of the three-fourths claimed, upon Petition, to be entitled to that proportion of the fund:—

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Held that, under the English law, the Court would, after so long a possession and user, have presumed a grant:

Held, further, that under the same law the Court would have held the settlement in 1827 by one of the co-tenants to have been a legal ouster of the other:

Held, further, that the case was governed by Indian law; that under the provisions of the Act of the Indian Legislature the claim of the Petitioner had become barred, and that he was entitled to five-ninths only of the fund.

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LIS PENDENS—Suit to restrain from exercising power of appointment 391
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LOCKE KING'S ACT (17 & 18 *Vict. c.* 113)—*Will—Lapsed Devise—Descent Cast—Mortgage Debt—Amendment Act* (30 & 31 *Vict. c.* 69).] A heir-at-law and customary heir of a testator, taking by descent an estate which has been the subject of a lapsed devise in the will is not a person claiming "under or by virtue of a will" within the meaning of the proviso contained in the 17 & 18 Vict. c. 113, s. 1.
NELSON *v.* PAGE 25

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MERCHANT SHIPPING ACT (17 & 18 Vict. c. 104), s. 93 95
See INFANT SHIPOWNER.

MISREPRESENTATION IN PROSPECTUS — *Laches* — *Company—Shareholder—Suppressio veri—Payments by Promoter to Directors.*] A company was formed for the purpose of making and working a railway in *Switzerland* under a concession vested in *H.*, a contractor, and transferred by him to the company under an agreement by which he obtained the contract for making the line, the terms of the contract being stated in the articles of association. Before the formation of the company *H.* agreed to give *S.*, who afterwards became the chairman of the board of directors, £2000 worth of paid-up shares, and after the company was formed he paid the deposit and allotment moneys on the shares taken by *S.* and several other directors, and gave to *C.* and *W.*, who afterwards became directors, bills for £10,000, in consideration of their procuring a credit company to bring out the company. The

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directors issued a prospectus, which contained no misrepresentations, but did not mention the transactions between *H.* and the directors:—

Held, that there was no such suppression of material facts in the prospectus, as to entitle a person who had been induced by it to take shares in the company, to be relieved of his shares.

Semble, that a shareholder who institutes a suit to be relieved of his shares on the ground of misrepresentation more than three months after he has discovered the misrepresentation, loses his right to relief by his delay.

HEYMANN *v.* EUROPEAN CENTRAL RAILWAY COMPANY 154

MORTGAGE—Apportionment of mortgage debt—Original mortgage and further charge—Real and personal estate 501
See APPORTIONMENT OF MORTGAGE DEBT.

———— Custody of deeds, right to—Second mortgagee 139
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———— Locke King's Act—Lapsed devise—Heir-at-law 25
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———— Priority—Deposit of title deeds—Adverse possession .. 139
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———— Sub-mortgage—Claim by sub-mortgagee against mortgagor's estate 399
See SUB-MORTGAGE.

———— Two estates—Exoneration—Specific and residuary devise .. 371
See MORTGAGE OF TWO ESTATES.

MORTGAGE OF TWO ESTATES—*Specific Devise of Part of Mortgaged Estate—Exoneration of Mortgaged Estate—Estate by Curtesy—Bankruptcy of Husband.*] The owner of two estates subject to the same mortgage, specifically devised one of them, and left the other to pass by a residuary devise:—

Held, that the residuary devise was specific, and that the two estates must therefore bear the mortgage debt rateably.

Where a wife's real estate did not fall into possession till after the husband's bankruptcy and discharge:—

Held, that the husband, though there had been issue of the marriage, had not at the time of his bankruptcy any such contingent interest in the estate, as tenant by the curtesy, as would pass to his assignees.

GIBBINS *v.* EYDEN 371

NAVIGABLE RIVER—Right to *alveus* 377
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NEW TRUSTEES—Appointment of—Trustee Act, 1850—Service on guardian of infant heir 323
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See AMALGAMATION OF COMPANIES.

——— Constructive—Covenant by grantor of reversion 523
See COVENANT NOT TO SELL SPIRITUOUS LIQUORS.

——— Constructive—Right of way reserved by vendor 427
See WAY OF NECESSITY.

OFFICIAL LIQUIDATOR—*Remuneration—Regulation of May*, 1868—*Companies Act*, 1862, *s.* 93.] 1. In determining the amount of remuneration payable to an official liquidator under the winding up of a bank commenced before the Order of May, 1868, the Court, having regard to the circumstances under which the bank stopped payment, and the amount of assets and dividends, refused to allow payment to the liquidator upon the basis of a percentage.

2. The Court will not increase or diminish the amount of remuneration by reason of profit or loss having resulted from the operations of the liquidator.

3. Having regard to the Order of May, 1868, the remuneration of the liquidator must be estimated by the time and labour employed by himself and his clerks; but in such calculation the services of clerks of the bank who have been employed by the liquidator and paid out of the assets of the bank in liquidation, will not be included.

In re AGRA AND MASTERMAN'S BANK. CANNAN'S CLAIM .. 102

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PAID-UP SHARES—Signing memorandum for 11
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PAROL—Agreement for partnership 538
See PARTNERSHIP BY PAROL.

PARTIAL DISTRIBUTION of estate—Costs of 436
See COSTS OF ADMINISTRATION SUIT. 1.

PART OF PIECE OF LAND—*Counter-notice to take whole of Premises—Lands Clauses Act, s.* 92—*Further Consideration — Order compelling Company to take Proceedings to ascertain Amount to be paid—Form of Order.*] Defendants, a railway company, gave to the Plaintiffs a notice to treat for the purchase of a portion of a piece of land; and the Plaintiffs gave the Defendants a counter-notice to take the whole. The company paid into Court the value of the portion of the piece of land described in their notice to treat, gave to the Plaintiffs the usual bond for the amount, and went into possession of the portion.

In a suit praying for a declaration that the Defendants were bound to purchase the whole of the premises comprised in the Plaintiffs' counter-notice, and for an injunction, it was declared that the Defendants were so bound; and an inquiry was directed as to title, reserving further consideration.

The title having been found to be good, but the company not having gone into possession of the rest of the premises described in the counter-notice, or taken any further steps:—

Held, on further consideration, that the Plaintiffs were entitled to an order compelling the company forthwith to take all necessary and proper proceedings, under the *Lands Clauses Act*, for the purpose of ascertaining the amount to be paid by them to the Plaintiffs as the value of the premises.

MARSON *v.* LONDON, CHATHAM, AND DOVER RAILWAY COMPANY 546

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———— Suit for—Legal question—Rolt's Act .. .. 296, 298, n.
See PARTITION SUIT. 1, 2.

———— Suit for—Sale 1, 126
See PARTITION SUIT. 3, 4.

PARTITION SUIT—*Legal Question—Rolt's Act—Bill retained, with Liberty to bring an Action.*] Plaintiff, claiming to be legally entitled to an undivided share in a freehold estate, filed a bill for partition, raising the question of whether, upon the construction of the settlor's will, the estate passed under a specific or under a residuary devise:—

Held, that the Court had no jurisdiction to try such a question in a partition suit; and bill ordered to be retained for a year, with liberty to the Plaintiff to bring such action as he might be advised.

Application that the Defendant might be put on terms not to set up the defence of the Statute of Limitations refused.

SLADE *v.* BARLOW 296

2. ———— *Legal Question—Rolt's Act.*] The Court will refuse to try a disputed legal title in a partition suit. Whether it has power to do so under *Rolt's Act—quære.*

BOLTON *v.* BOLTON .. .. 298, n.

3. ———— *Sale—31 & 32 Vict. c. 40.*] The 4th section of the *Partition Act*, 1868 (31 & 32 Vict. c. 40), is retrospective.

Accordingly in a partition suit instituted before the passing of the Act by the owners of two undivided fourths of the property and praying a sale, which was opposed by the owners of the remaining fourths:—

Held, that the *onus* was thrown upon the parties opposing, and in the absence of any sufficient cause shewn against it a sale was ordered.

LYS *v.* LYS 126

4. ———— *Sale—Costs—31 & 32 Vict. c. 40.*] In a partition suit, where the property was held in equal shares, the costs of all parties, on a decree for sale under 31 & 32 Vict. c. 40, were ordered to be paid out of the estate.

MILLER *v.* MARRIOTT 1

PARTNERSHIP—Agreement by parol 538
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———— Contract for—Specific performance 112
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———— Solicitor misapplying money 504
See FIRM OF SOLICITORS.

PARTNERSHIP BY PAROL—*Agreement to share Profits and Losses equally—Unequal Advances—Insufficient Assets—Deficiency to be borne in equal Shares.*] *A.* and *B.* went into partnership without written articles; the parol agreement between them being that profits should be shared and losses borne in equal shares. *A.* died, and on accounts of his estate being taken in an administration suit, it was found that he had advanced more capital than *B.*, to the extent of £1900. The net assets of the partnership were only £1400:—

Held, that the deficiency of £500 was a debt to which both estates were liable to contribute equally.

NOWELL *v.* NOWELL 538

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POWER—Appointment by married woman of whole fund to executors—Conversion into her personal estate 310
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———— Rolt's Act—Title to land—Question between co-Defendants .. 197
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———— Trustee Act—Appointment of new trustees—Service on guardian of infant heir 323
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See LIMITATIONS, ACT OF, FOR INDIA.

PRESUMPTION OF DEATH — *Presumption of Death at particular Period within Seven Years—Evidence of Death.*] A person who was entitled to the dividends on stock payable in April and October, applied for his dividends in April, 1860, and was last seen in August in the same year, when he was in a very bad state of health. He never applied for his half-yearly dividends in the ensuing October. It appeared that he was of very dissolute habits, and chiefly depended on the dividends for his maintenance. The question being whether he died before November, 1860:—

Held, that not having applied for the dividends due to him in October, 1860, and having regard to the state of his health when last seen, the presumption must be that he died before November, 1860.
In re BEASNEY'S TRUSTS 498

PRINCIPAL AND SURETY — Release of surety—Surety for interest only 28
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See Apportionment of Mortgage Debt.

REFRESHMENT ROOMS on railway—Specific performance of agreement 116
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REGISTRATION OF COPYRIGHT—*Date of Publication*—5 & 6 *Vict.* c. 45.] In registering a copyright in the registry book of the *Stationers' Company* in pursuance of the Act 5 & 6 Vict. c. 45, it is not sufficient to enter the month in which the first publication takes place; but the day of first publication must be stated.
Mathieson *v.* Harrod 270

RELEASE OF SURETY—*Principal and Surety—Surety for Interest only—Release by Creditor, reserving Remedies against Third Parties.*] In a mortgage deed a third party joined as surety, but for the due payment of interest only, and the principal and surety entered into a joint and several covenant with the creditor to pay the interest. Afterwards the debtor executed a deed registered under the *Bankruptcy Act*, 1861, whereby he assigned all his property upon trust for creditors, and the creditors released the debtor from all debts, with a proviso that nothing therein contained should affect any mortgage held by any creditor, or any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor either alone or jointly with any other person:—

Held, that the effect of the deed was to give a qualified release, and not to extinguish the debt; and that the remedy of the creditor against the surety for interest, was not barred.
Green *v.* Wynn 28

REMOTENESS—Gift over after gift to unborn person for life 363
See Unborn Issue.

RENT-CHARGE — Railway company — Sale in consideration of rent-charge—Vendor's lien 409, 439
See Vendor's Lien against Railway Company. 1, 2.

REPUTATION—Injury to—Injunction against 488
See Injury to Reputation.

RIGHT OF WAY—Implied reservation 427
See Way of Necessity.

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RIPARIAN OWNERS—*Tidal Navigable River—Private and Public Injury.*] An information and bill was filed by the Plaintiff, a riparian proprietor on a tidal navigable river, to restrain the Defendant, an opposite riparian proprietor, from constructing a jetty in the *alveus* of the river so as to injure the Plaintiff's property and interfere with the navigation:—

Held, that a riparian proprietor had no greater right to use the *alveus* of a tidal than a non-tidal river, and that although the Plaintiff had proved no serious injury to his property, he was entitled to an injunction:

Held, also, that the suit being by information and bill was properly framed in respect of the private and public wrong complained of.
ATTORNEY-GENERAL *v.* EARL OF LONSDALE 377

ROLT'S ACT (25 & 26 *Vict. c.* 42)—*Title to Land—Ejectment.*] Certain land in the possession of one of the Defendants having been injuriously affected by the Plaintiff's works, the damage was assessed by a jury, but as the other Defendant set up a title to the property in question, the Plaintiffs filed a bill to have it declared which of the Defendants was entitled to the compensation awarded:—

Held, that the question of title to the money being only incidental to the title to the land, the case did not come within *Sir John Rolt's Act*, and that the Defendant in possession had a right to put the other Defendant to prove his title in an action of ejectment.
METROPOLITAN BOARD OF WORKS *v.* SANT 197

———— Partition suit—Jurisdiction .. .. 296, 298, n.
See PARTITION SUIT. 1, 2.

SALARY—*Colonial Agent of Company—Shareholder—Agreement that Call Money should be debited in Agency Account—Continued Employment after Liquidation—Set-off—Salary.*] By an agreement between a limited trading company and their agent in a British colony, it was provided that the salary of the agent was to be £750 a year for a period of five years from the day of his arrival in the colony; and in addition he was to be allowed certain commissions on remittances in money or produce which should be made by him to *England*. The agent was to pay up at once £2 per share on fifty shares of £100 each, which he had been required to take in the company, and the company agreed from time to time to place £8 per share, as well as all other sums that might become due from the agent, to his debit on account of the calls to be made on the shares.

Whether such an agreement could be lawfully made by a company with one of its shareholders, *quære*.

The agent arrived at the colony in December, 1865, and commenced business. In March, 1867, a voluntary winding up of the company was ordered to be continued under supervision, and in January, 1868, the agent's services were put an end to, under a power of attorney from the company and the liquidators, upon certain terms of compromise then agreed to:—

Held, independently of the agreement, that the liquidators having, in the course of their continued employment of the agent, become indebted to him, and having entered into the compromise, were not entitled to enforce against him the payment of a call made in the winding up without bringing the debt into account:

Held, further, following *Yelland's Case* (Law Rep. 4 Eq. 350), that the agent was entitled to his full salary to the end of the five years.
In re LONDON AND COLONIAL COMPANY. *Ex parte* CLARK .. 550

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See SEPARATE ESTATE.

SCHEME—Free school—Clothing—Capitation fees—Selection for proficiency 353
See GRAMMAR SCHOOL.

SCHOOL—Scheme for charity school 353
See GRAMMAR SCHOOL.

SECURITIES FOR BILLS OF EXCHANGE—*Bankruptcy—Remittances sent by corresponding Firm to cover Acceptances—Bankruptcy of both Firms—Ex parte Waring.*] By a written agreement, *B. L. & Co.*, of *Barbados*, were in the habit of buying sugar and consigning it to *W. R. & Co.*, of *London*, paying for it in drafts upon *W. R. & Co.*, indorsed over to the planters. By an unwritten agreement or custom, *B. L. & Co.* were also in the habit of drawing bills upon *W. R. & Co.*, and selling the drafts to bankers and others, and then of buying bills and remitting them to *London* to keep *W. R. & Co.* in funds to meet their acceptances of the drafts so drawn upon them, the amounts being carried into general account. *W. R. & Co.* stopped payment. At the time, undue acceptances of theirs were running to the extent of about £25,000. Upon the news arriving in *Barbados*, *B. L. & Co.* also stopped payment, and were made insolvent according to the law of the island. After the stoppage of the *London* firm, drafts arrived in *London* for acceptance to the amount of about £16,000, which were dishonoured; and remittances arrived to the amount of nearly £12,000. *W. R. & Co.* were afterwards made bankrupt:—

Held, that there was no specific appropriation of the remittances to cover the drafts sent home by the same mails for acceptance:

Held, further, that the remittances must be carried into general account between the firms; and that so far as they were *in specie*, or to be treated as *in specie*, at the time of the bankruptcy the principle of *Ex parte Waring* (19 Ves. 345) and *Powles* v. *Hargreaves* (3 D. M. & G. 430) must apply.
TRIMINGHAM *v.* MAUD 201

2. ——————————— *Company in Liquidation —Insolvency of Drawer and Acceptor — Deposit of Securities — Ex parte Waring.*] *L.* deposited certain securities with a company upon an agreement that the company might sell them and apply the proceeds in reimbursing themselves any money owing by *L.* to them. Subsequently the company accepted bills for *L.*'s accommodation. Afterwards, before the bills were paid, the company went into liquidation, and *L.* made an assignment for the benefit of his creditors. The only liability of *L.* to the company was in respect of these bills:—

Held, that *Ex parte Waring* (19 Ves. 345) did not apply, and that neither the bill holders nor *L.* were entitled to have the proceeds of the sale of the securities applied in payment of the bills.
In re NEW ZEALAND BANKING CORPORATION. LEVI & CO.'S CASE 449

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SEPARATE ELECTION—*Right of, in several Next of Kin—Administrator—Annuity in lieu of Dower.*] A testator, by his will, made various bequests in favour of his wife, including some property to which she was entitled in her own right, and he also gave her an annuity, charged on specified real estate, in lieu of dower and free-bench. The wife survived her husband, and during her life received the benefits given her by the will, but never elected whether to take under or against the will, and died intestate, leaving four next of kin, three of whom elected to take under the will, while the fourth, who was her administrator, elected to take against it:—

Held, that each of the next of kin had a separate right of election, that neither the election of the majority nor that of the heir and administrator bound the others, and that in taking the accounts on such election the annuity specifically charged in lieu of dower must be brought into account, credit being given for the due proportion of dower.

FYTCHE *v.* FYTCHE 494

SEPARATE ESTATE—*Liability of Married Woman—Savings from Separate Estate—Calls on Shares.*] One of two trustees of a marriage settlement, under which the wife took a separate estate for life without power of anticipation, having shares in a bank vested in him upon the trusts of the settlement, obtained an allotment of new shares at the request of the wife, and upon the faith of her representation that the purchase-money should be paid out of certain savings of her separate estate. The bank failed, and calls were made upon the trustee, who filed a bill to enforce repayment out of the wife's savings:—

Held, that the savings of the wife's separate estate were liable to indemnify the trustee against all calls and liabilities incurred on her behalf in respect of the shares:

Held, also, that money arising from savings of separate estate which had been invested by the wife in the names of the trustees of the settlement without any intimation that it was to be held on the trusts of the settlement, was liable to indemnify the trustee of the shares.

BUTLER *v.* CUMPSTON 16

SEPARATION DEED—*Injunction—Suit in Divorce Court—Condonation of Adultery.*] Upon motion by a wife for an injunction to restrain her husband from proceeding in the Divorce Court to obtain a dissolution of marriage, on the ground of a contract by the Defendant to condone all former causes of complaint, and not to take legal proceedings in respect thereof:—

Held, that as the contract might be set up by way of defence in the Divorce Court, and as it was executed by the husband in ignorance of the fact that his wife had committed adultery, and on her positive assertion of innocence, this Court would not interfere to stay proceedings in the Divorce Court.

BROWN *v.* BROWN 185

2. ——————— *No Separation taking place.*] By a deed, which recited that *B.* and his wife had agreed to live apart from each other during the remainder of their lives "upon the terms and conditions thereinafter contained," *B.* covenanted with trustees to allow his wife to live separate, and settled a sum of money upon trust for his wife for her life, and for their children after her death, with a proviso that if *B.* and his wife should afterwards agree by writing under their hands, attested by two witnesses, to cohabit together, the income of the trust fund should be paid to *B.* during such cohabitation, and

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the trustees covenanted to indemnify *B.* against his wife's acts and engagements.

No separation took place between *B.* and his wife :—

Held, that the deed was a separation deed, and not a voluntary settlement, and that as no separation took place, it was wholly void.

BINDLEY *v.* MULLONEY 343

SERVICE—Trustee Act—Appointment of new trustees—Guardian of infant heir 323

See VESTING ORDER.

SET-OFF—Winding up—Calls against salary of colonial agent 550

See SALARY.

SET-OFF IN WINDING UP—*Calls in Winding-up against Debenture —Assignment — Rights of Assignee — Companies Act*, 1862, *s.* 75.] After a company has commenced to be wound up, a shareholder can assign a debt due to him by the company only subject to a right of set-off by the company of all calls which may be made subsequently to the assignment and previously to the payment of the debt.

A company commenced to be wound up in December, 1866. On the 1st of March following a shareholder assigned five debentures of the company, and notice of the assignment was given to the liquidator on the same day. In June, 1867, and February, 1868, calls were made on the assignor for amounts exceeding what was due on the debentures :—

Held, that the calls not having been paid, the assignee was not entitled to prove against the company on the debentures.

Grissell's Case (Law Rep. 1 Ch. 528) commented on.

In re CHINA STEAMSHIP COMPANY. *Ex parte* MACKENZIE .. 240

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SOLICITOR'S LIEN—*Solicitor and Client—Defendant to Foreclosure Suit —Charge for Costs*—23 & 24 *Vict. c.* 127, *s.* 28.] *S.* and *D.* were respectively entitled to one-third and two-thirds of a moiety of certain real estates subject to mortgages thereon. *S.* was also entitled to a charge on the other moiety in respect of certain judgment debts due to him. *S.* filed a bill for redemption and foreclosure, to which *D.* was a Defendant. A decree was made whereby it was declared that certain sums ought to be charged on the moiety of *S.* and *D.* Upon an appeal

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by *D.*, the decree was varied in his favour; and he was also successful in resisting claims of *S.* in working out the decree. Before the general certificate in the suit was made, *D.* became bankrupt, and his solicitors presented a Petition praying for a declaration that they were entitled to a charge on his estate and interest for the amount of their costs, and for a sale of such estate and interest, and application of the proceeds of sale in payment of the costs:—

Held, that the estate and interest of *D.* was property preserved in the suit within the meaning of 23 & 24 Vict. c. 127, s. 28; and that the Petitioners were entitled to a charge and sale as prayed for.
Scholefield *v.* Lockwood 83

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24 & 25 Vict. c. 134, s. 154 3
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31 & 32 Vict. c. 40 .. .. 1, 126
See PARTITION SUIT. 3, 4.

STOPPAGE IN TRANSITU—*Cargo shipped for Account and Risk of Consignee—Arrival of Ship at Port of Call for Orders—Constructive Delivery.*] *A.*, a merchant at *Bahia*, shipped at *Bahia* a cargo of sugar by the order and at the risk of *B.*, of *Glasgow*, in a ship chartered by *A.* The charterparty provided, that the ship should proceed "either direct or *viâ Falmouth*, *Cowes*, or *Queenstown*, for orders to a port in the *United Kingdom*, or to a port on the continent (between certain limits), and deliver the cargo in conformity with the bill of lading." The bill of lading stated that the ship was "bound for *Falmouth*, *Cowes*, or *Queenstown* for orders," and that the cargo was to be delivered "unto order or its assigns." *A.* sent to *B.* the charterparty, the bills of lading, indorsed to "*B.* or order," and the invoice, which stated that the cargo was shipped, "for the account and risk of *B.*, for *Falmouth*, *Cowes*, or *Queenstown* for orders and a market."

The ship arrived at *Falmouth*, and the master, in pursuance of written instructions from *A.*, announced its arrival to *A.'s* agents in *London*, and asked them for orders. The agents applied to *B.* for instructions as to the destination of the ship; but before any instructions were given *B.* became insolvent, and thereupon *A.'s* agents stopped the cargo:—

Held, that the cargo had not been constructively delivered to *B.*, that the *transitus* was not over, and that the stoppage was valid.

FRASER *v.* WITT 64

SUB-MORTGAGE—*Mortgage of Lease—Disclaimer—Forfeiture of Lease—Claim of Sub-Mortgagee against the Mortgagor's Estate.*] *B.*, the owner of a lease of a house, assigned it to *D.* for the residue of the term by way of mortgage to secure £3000 and interest. *D.* sub-mortgaged the debt, and assigned the house for the residue of the term, less three days, to *E.*, to secure £1200 and interest. *B.* died, and in an administration suit against his executors, *D.* and *E.* brought in a claim for £3000. *B.'s* executors assigned their equity of redemption to *D.* *D.* further sub-mortgaged the debt, and assigned the house for the residue of the term, less three days, to *L.*, to secure £1000 and interest. *D.*, by registered deed, assigned all his estate to trustees for the benefit of creditors. *E.* filed a bill against *D.'s* trustees and *L.* for foreclosure; *B.'s* executors not being parties. *D.'s* trustees disclaimed by answer, and *L.* was foreclosed. *E.*, who had been paying the ground rent for some years, at length ceased, and the original lessors entered:—

Held, that *E.* was entitled to prove against *B.'s* estate, which was insufficient, for the whole sum of £3000; but that he was not to receive more than the amount due to him for principal, interest, and costs on the £1200 mortgage debt.

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Held, also, that the disclaimer by *D.*'s trustees extended only to matters in issue in the suit, and did not operate so as to enlarge the estate of the Plaintiff.
In re Burrell. Burrell *v.* Smith 399

SUBSCRIBER OF MEMORANDUM — *Contributory — Signing Memorandum for Paid-up Shares—Companies Act*, 1862, *s.* 14.] *B.* subscribed the memorandum of association of a company for 450 ordinary shares and 138 paid-up shares :—
Held, that he was a contributory in respect of the 450 shares, but not of the 138 paid-up shares.
Semble, the decision would have been otherwise if he had subscribed for 138 paid-up shares only.
In re South of France Company. Baron de Beville's Case 11

SUBSTITUTED OR ORIGINAL GIFT—Gift over after gift to unborn issue for life 363
See Unborn Issue.

SUICIDE—Condition in policy of assurance 394
See Life Assurance.

SUPERVISION ORDER—Superseded by compulsory winding-up .. 76
See Voluntary Winding-up.

SUPPLEMENTAL BILL—*Supplemental Statement—Amendment* — 15 & 16 *Vict. c.* 86, *s.* 53 — *Cons. Ord.* xxxii., *Rule* 2 — *Alternative Relief.*] Plaintiff filed a bill, alleging that whilst suffering from bodily infirmity she executed, in favour of the Defendant, a deed of which she had no copy, and which the Defendant refused to produce, and praying that it might be delivered up to her to be cancelled. She then filed a second bill stating the above facts, and that she had since obtained inspection of the deed, and, finding that it contained a power of new appointment in her, had made an appointment under it to herself absolutely; also that the Defendant, by his answer in the former suit, claimed to hold the deed as trustee, and praying that, in case it should appear to the Court on the hearing of the former suit that the deed ought not to be declared void as thereby prayed, it might be declared that the Plaintiff was entitled to the possession of it, and that it might be ordered to be delivered up to her; also, that the second suit might be heard with, and might, " so far as necessary or proper," be treated as supplemental to the former.
Demurrer to the second bill overruled.
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SUPPRESSIO VERI—Misrepresentation in prospectus 154
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SURETY—Qualified release of—Surety for interest only 28
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SURVIVORSHIP—Gift to children at twenty-one with benefit of survivorship 80
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———— Gift to survivors or survivor—Tenant for life .. 478
See Gift to Survivors or Survivor.

TAXATION OF COSTS—*Three Counsel.*] The costs of a third counsel allowed where the junior counsel who had drawn the answer and conducted the cause was called within the Bar before the hearing.
Horsley *v.* Cox 464

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TENANCY IN COMMON—Indian law 302
See LIMITATIONS, ACT OF, FOR INDIA.

TENANT FOR LIFE AND REMAINDERMAN—Compensation under Lands Clauses Act—Improved value 72
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——————————— Timber—Apportionment of income of proceeds 461
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TENDER OF PAYMENT—Calls—Payment under protest—Forfeiture of shares 324
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TIDAL RIVER—Right to *alveus* 377
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TIMBER—Proceeds of sale of—Settled estate—Apportionment of income 461
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TITLE TO LAND—Jurisdiction under Rolt's Act 197
See ROLT'S ACT.

TONTINE DEBENTURES—Marriage settlement 231
See COVENANT TO SETTLE.

TRANSFER OF SHARES—*Transfer to a limited Company—Power to hold Shares in another Company—Ultrà Vires—Contributory.*] A banking company (*A.*), unauthorized to accept as security shares in a public company except by a transfer to a third person, took a transfer of shares in a banking corporation (*B.*) in which they were named as transferees. This was executed not under seal but by the signature of the manager, pursuant to a resolution of the board. The banking company (*A.*) dealt with such shares as their property and received dividends in respect of some of them:—

Held, that company *A.* were properly placed on the list as contributories of the banking corporation (*B.*)

In re ASIATIC BANKING CORPORATION. ROYAL BANK OF INDIA'S CASE 91

TRUSTEE—Breach of trust—Trustee mixing trust property with his own 466
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——— Costs under Trustee Relief Act—Excessive costs 194
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——— Creditors' deed—Right to sue 267
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——— Power of—Investment in freehold land—Freehold ground rents 463
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TRUSTEE ACT—Service of Petition for vesting order 323
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TRUSTEE OF CREDITORS' DEED—*Bankruptcy Act*, 1861, *s.* 197—*Right of Trustee to sue—Authority to file Bill—Solicitor—Costs.*] The trustee of a creditors' deed in the form given in Schedule D. to

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the *Bankruptcy Act*, 1861, can sue in his own name to enforce a contract with the debtor, and if the debtor is joined as co-Plaintiff in such a suit, he is entitled to have his name struck out, with costs against the solicitor, though he may have given a general authority to take all steps necessary to enforce the contract.
FENTON *v.* QUEEN'S FERRY WIRE ROPE COMPANY 267

TRUSTEE MIXING TRUST PROPERTY—*Lessor, Trustee, and Mortgagee—Destruction of Trust Property by mixing of Trust Property with Trustee's own.*] *A.*, who was one of the trustees under a settlement, demised a house of which he was lessee to *S.*, who covenanted to repair. *S.* afterwards, out of a loan, made with the consent of the *cestui que trust*, of a part of the trust funds, purchased from *A.* the furniture in the house, and executed a mortgage of the underlease, and a bill of sale of the furniture, to the trustees. *S.* having made default in payment of principal and interest, *A.* re-entered, and subsequently assigned, for a premium and for an annual rent, the residue of the term vested in him of the house to *F.*, who purchased the furniture, and also paid a sum towards the repairs. *A.* invested a sum to make good the principal trust fund, but refused to pay the interest which had accrued due from *S.*

Held, that *A.* had, by his conduct, mixed the trust funds; and that the interest must be paid out of the sum received by him from *F.* for repairs.
COOK *v.* ADDISON 466

TRUSTEE RELIEF ACT—*Payment into Court—Deduction for Costs.*] Where a trustee pays money into Court under the *Trustee Relief Act*, and has incurred costs which he claims to deduct from the fund, but which are disputed, his proper course is to pay the whole fund into Court without deducting such costs, leaving the Court to decide the amount of costs to which he is entitled.

Therefore, where a trustee paid money into Court after deducting a sum for costs and expenses which the Court deemed excessive, the Court, on bill by the *cestuis que trust*, ordered him to make good the whole of the trust fund in Court, and to pay the costs of the suit; the trustee to be allowed such costs as he was properly entitled to when the fund in Court came to be dealt with.
BEATY *v.* CURSON 194

ULTRA VIRÈS—Company holding shares in another company—Contributory 91
See TRANSFER OF SHARES.

UNAUTHORIZED PAYMENT BY DIRECTORS—*Company—Suit by Company to recover from Person who had received such Payment.*] The directors of a banking company, whose articles of association provided that the directors might, without any authority from the shareholders, "sell or dispose of any of the property of the company," paid out of the funds of the company £500 to *H.*, a stockbroker, being the amount of the premium on 1000 shares of the company purchased by him in the market, at the request of the directors, for *F.*, whom they had requested to join the board. The company was wound up, and a suit was instituted on its behalf by the official liquidator against *H.*, to which neither the directors nor *F.* were made parties, to recover from him the £500, on the ground that it was a breach of trust by the directors of which *H.* had notice:—

Held, that as the whole transaction could not now be annulled, nor

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the parties be replaced in their former position, such a suit could not be entertained.

London, Hamburgh, and Continental Exchange Bank *v.* Henry 334

2. UNAUTHORIZED PAYMENT BY DIRECTORS—*Company—Promotion-money payable on Allotment—Premature Allotment—Payment to Directors by Promoters—Costs.*] The articles of association of a banking company, with a nominal capital of £1,200,000 in 60,000 shares, of which the prospectus stated that the first issue would be 30,000, empowered the directors to commence business as soon as they should think fit, notwithstanding the whole capital might not have been subscribed for, and provided that upon the first allotment of shares £10,000 should be paid to the promoters. When only 5000 shares had been subscribed for, and before the company was in a situation to commence business, the directors allotted the shares and paid £5000 to the promoters, who immediately paid to four of the directors £500 apiece. The company having been ordered to be wound up:—

Held, in a suit by the official liquidator in the name of the company against the directors, to which the promoters were not parties, that the directors could not be charged with the money paid to the promoters, but that each of the four directors must repay to the company the £500 received by him from the promoters.

Where a company in course of liquidation is ordered to pay costs, such costs are not to be proved as a debt in the winding-up, but are payable in full out of the assets of the company.

Madrid Bank *v.* Pelly 442

UNBORN ISSUE—*Remoteness—Substitution or Original Gift.*] After a gift to an unborn person for life, there may be a good gift over if it vest within lives in being and twenty-one years.

Gift after the death of an unborn tenant for life to all the children of *A. B.*, a living person, share and share alike, and the child or children of such of the said children as shall be then dead, according to the Statute of Distributions; but in case there shall be no child or grandchildren of the said *A. B.* then living, then over.

This is not an original gift to the children of *A. B.* vesting at birth, with a mere invalid substitutionary gift to their children; but is an original gift to children and grandchildren living at the decease of the unborn tenant for life, and therefore too remote, and void.

The cases of *Ashley* v. *Ashley* (6 Sim. 358), and *Avern* v. *Lloyd* (Law Rep. 5 Eq. 383), commented upon.

Stuart *v.* Cockerell 363

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———————— Sale to railway company in consideration of rent-charge—Vendor's lien 409, 439

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VENDOR'S LIEN AGAINST RAILWAY COMPANY—*Sale in Consideration of Rent-charge—Lands Clauses Act*, ss. 10, 11—*Arrears of Rent-charge—No Vendor's Lien.*] By an agreement dated in 1851, a company, under powers conferred by the *Lands Clauses Act*, contracted, in consideration of the payment of a yearly rent-charge, to purchase land for the construction of docks. The company had entered,

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and completed the construction of the docks, but had not made any payment in respect of the rent-charge :—

Held, that the vendors were not entitled to a lien for the unpaid arrears of the rent-charge.

EARL OF JERSEY *v.* BRITON FERRY FLOATING DOCK COMPANY .. 409

2. VENDOR'S LIEN AGAINST RAILWAY COMPANY—*Rent-charges —Lands Clauses Act, ss.* 10, 11—*Debentures—Priority.*] The holders of rent-charges created by a railway company under sects. 10 and 11 of the *Lands Clauses Act*, and charged on the undertaking of the company, have a first charge on the lands of the company comprised in the deeds of charge, and are entitled to have their rent-charges paid out of the net earnings of the undertaking in priority to debenture holders.

EYTON *v.* DENBIGH, RUTHIN, AND CORWEN RAILWAY COMPANY 439

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VESTING ORDER—*Practice—Service — Trustee Act,* 1850—*Appointment of new Trustees—Infant Heir of former Trustee.*] Service of a Petition for vesting in newly-appointed trustees lands which had descended to the infant heir of the former sole trustee, upon the guardian of the infant heir is not necessary.

In re LITTLE 323

VOLUNTARY SETTLEMENT—Bill to set aside—Frame of suit .. 347
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——— Subsequent creditors 317
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——— Separation deed where no separation took place 343
See SEPARATION DEED. 2.

VOLUNTARY WINDING-UP—*Company—Winding-up — Supervision superseded by Compulsory Winding-up.*] Five months after the commencement of the voluntary winding-up of a company two Petitions were presented, the one for the continuation of the voluntary winding-up under the supervision of the Court, the other for a compulsory winding-up; the Court being of opinion that the winding-up ought to be compulsory, but not desiring to alter the date of its commencement, made an order on the first Petition for the continuation of the voluntary winding-up under supervision, and an order dated on the following day on the second Petition for a compulsory winding-up.

In re UNITED SERVICE COMPANY 76

WARING, EX PARTE (19 Ves. 345)—Doctrine of 201, 449
See SECURITIES FOR BILLS OF EXCHANGE. 1, 2.

WAY OF NECESSITY—*Apparent Easement — Implied Reservation—Notice—Acquiescence.*] On the sale of land to a purchaser, who has notice that the adjoining land is to be laid out in building in a manner which will make a right of way over the purchased land necessary to the vendor, such right of way is reserved to the vendor by implication as a way of necessity.

A. purchased from *B.* the lease of a house, part of an estate agreed to be let to *B.* upon building leases. There was an open archway under part of the house, which was described as a " gateway " in the

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ground plan of the house drawn on the lease, and which, when the buildings on the estate were completed in accordance with the plan of the building agreement, formed the only means of access to a mews behind the house. At the time of the purchase, the buildings not being then completed, there were other means of access to the mews. The assignment contained no reservation of a right of way, but the archway was used as an entrance to the mews until the buildings were completed:—

Held, that a right of way through the archway was reserved to *B.* by implication, the state of the property at the time of the purchase being such as to put *A.* upon inquiry, and fix him with constructive notice of the building plan:

Held, also, that *A.* having stood by and allowed *B.* to build so as to leave no other access to the mews, could not afterwards dispute the right of way.

Davies *v.* Sear 427

WILL—Children at twenty-one—"Benefit of survivorship" 80
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——— Election—Appointment failing by subsequent event 215
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——— Remoteness—Gift over after gift to unborn person for life .. 363
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——— "Survivors or survivor" 478
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WILL OF MARRIED WOMAN—*Election—Power of Appointment—Failure by subsequent Event.*] *A.*, a married woman, having a general power of appointment notwithstanding coverture over fund (*a*), and also by her marriage settlement power to appoint funds (*b*) and (*c*) in case she died in her husband's lifetime, by her will, made in her husband's lifetime, appointed all these funds amongst several persons, some of whom were her next of kin. By the death of her husband in her lifetime *A.* became absolutely entitled to funds (*b*) and (*c*), but her will was not republished. Probate being limited to fund (*a*), which was insufficient to pay the legacies in full:—

Held, that those of the legatees who were also next of kin were not put to their election, but were entitled both to their shares of the residue (as to which, in the events that had happened, the appointment had failed), and also to proportionate parts of their legacies.
BLAIKLOCK *v.* GRINDLE 215

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BIBL.
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LONDON: PRINTED BY W. CLOWES AND SONS, DUKE STREET, STAMFORD STREET,
AND CHARING CROSS.